MONTANA LEGISLATIVE HISTORY

Chapter 120 19 93

Bill H _____ S 146 Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Feb 04	✓ C	Hearing Date(s)	Jan 21	✓ C
		C		Jan 25	✓ C
		C			C
		C			C
Date Out	Feb 05	✓ C		Jan 25	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

SB 145 INTRODUCED BY WATERMAN, ET AL.

DEFINE TRAUMATIC BRAIN INJURY AND ESTABLISH TRAUMATIC BRAIN INJURY TRUST FUND

1/14	INTRODUCED		
1/14	FISCAL NOTE REQUESTED		
1/14	REFERRED TO PUBLIC HEALTH, WELFARE & SAFETY		
1/14	FIRST READING		
1/20	FISCAL NOTE RECEIVED		
1/21	FISCAL NOTE PRINTED		
1/27	HEARING		
2/05	COMMITTEE REPORT—BILL PASSED		
2/06	2ND READING PASSED	27	21
2/08	3RD READING PASSED	29	21
	TRANSMITTED TO HOUSE		
2/09	REFERRED TO HIGHWAYS & TRANSPORTATION		
2/09	FIRST READING		
3/12	HEARING		
3/19	COMMITTEE REPORT—BILL CONCURRED		
3/29	2ND READING CONCURRED AS AMENDED	64	34
3/31	3RD READING CONCURRED	63	35
	RETURNED TO SENATE WITH AMENDMENTS		
4/03	2ND READING AMENDMENTS NOT CONCURRED	30	13
4/06	FREE CONFERENCE COMMITTEE APPOINTED		
4/14	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/16	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	49	0
4/17	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	39	0
	HOUSE		
4/07	FREE CONFERENCE COMMITTEE APPOINTED		
4/14	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/16	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	91	9
4/19	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	78	22
4/23	SIGNED BY PRESIDENT		
4/24	SIGNED BY SPEAKER		
4/24	TRANSMITTED TO GOVERNOR		
4/29	SIGNED BY GOVERNOR CHAPTER NUMBER 591 EFFECTIVE DATE: 7/01/93		

SB 146 INTRODUCED BY WATERMAN, ET AL.

CREATE LIMITED LIABILITY COMPANY ACT

1/14	INTRODUCED		
1/14	REFERRED TO JUDICIARY		
1/14	FIRST READING		
1/21	HEARING		
1/25	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/26	FISCAL NOTE REQUESTED		
1/26	2ND READING PASSED	48	0
1/27	3RD READING PASSED	47	0
	TRANSMITTED TO HOUSE		
1/28	FIRST READING		
1/28	REFERRED TO JUDICIARY		
2/01	FISCAL NOTE RECEIVED		
2/02	FISCAL NOTE PRINTED		

2/04	HEARING		
2/08	COMMITTEE REPORT—BILL CONCURRED		
3/04	2ND READING CONCURRED	96	3
3/08	3RD READING CONCURRED	90	8
	RETURNED TO SENATE		
3/12	SIGNED BY PRESIDENT		
3/12	SIGNED BY SPEAKER		
3/16	TRANSMITTED TO GOVERNOR		
3/18	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 120		
	EFFECTIVE DATE: 10/01/93		

SB 147 INTRODUCED BY B. BROWN, ET AL.

REQUIRE STATEWIDE REGISTERED ELECTORS LIST

1/14	INTRODUCED		
1/14	FISCAL NOTE REQUESTED		
1/14	REFERRED TO STATE ADMINISTRATION		
1/14	FIRST READING		
1/21	FISCAL NOTE RECEIVED		
1/22	FISCAL NOTE PRINTED		
1/22	HEARING		
1/29	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/01	2ND READING PASSED	32	14
2/02	3RD READING PASSED	32	18
	TRANSMITTED TO HOUSE		
2/03	FIRST READING		
2/03	REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT		
2/06	REREFERRED TO STATE ADMINISTRATION		
3/03	HEARING		
3/05	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/08	2ND READING CONCURRED	52	47
3/08	TAKEN FROM ENGROSSING AND REREFERRED TO APPROPRIATIONS		
3/17	TABLED IN COMMITTEE		

SB 148 INTRODUCED BY GAGE

REVISE ALLOCATION OF RESOURCE INDEMNITY TAX PROCEEDS

1/14	INTRODUCED		
1/14	FISCAL NOTE REQUESTED		
1/14	REFERRED TO TAXATION		
1/14	FIRST READING		
1/19	FISCAL NOTE RECEIVED		
1/20	FISCAL NOTE PRINTED		
1/21	HEARING		
2/11	TABLED IN COMMITTEE		

SB 149 INTRODUCED BY REA

REMOVE THE REQUIREMENT THAT A COUNTY COMMISSION ESTABLISH, MAINTAIN, DISCONTINUE, OR ABANDON A COUNTY ROAD WHEN PETITIONED BY PREEHOLDERS

1/14	INTRODUCED		
1/14	REFERRED TO LOCAL GOVERNMENT		
1/14	FIRST READING		
1/26	HEARING		
2/03	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/04	2ND READING PASSED	47	0
2/05	3RD READING PASSED	50	0

LC 0178/01

SENATE BILL NO. 146

INTRODUCED BY [signatures]

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE MONTANA LIMITED LIABILITY COMPANY ACT; AND AMENDING SECTIONS 30-13-141, 30-13-202, 30-13-301, 30-13-311, 35-1-308, 35-1-1031, 35-2-305, 35-2-826, 35-4-206, AND 35-12-505, MCA."

STATEMENT OF INTENT

A statement of intent is required for this bill because the secretary of state is authorized to adopt rules prescribing forms and establishing fees. The legislature intends that fees be commensurate with the cost of the services provided. It is further the intent of the legislature that the secretary of state make the forms consistent with existing forms used for corporate and other business entities, when practical and applicable, and that the new forms be as easy to use as possible.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1.** Short title. [Sections 1 through 78] may be cited as the "Montana Limited Liability Company Act".

NEW SECTION. **Section 2.** Definitions. As used in [sections 1 through 78], unless the context requires otherwise, the following definitions apply:

(1) "Articles of organization" means articles filed pursuant to [section 8] and those articles as amended or restated.

(2) "Corporation" means a corporation formed under the laws of this state or a foreign corporation.

(3) "Court" includes every court having jurisdiction in the case.

(4) "Disqualified person" means any person or entity that for any reason is or becomes ineligible under [sections 1 through 78] to become a member in a professional limited liability company.

(5) "Event of dissociation" means an event that causes a person to cease to be a member, as provided in [section 45].

(6) "Foreign corporation" means a corporation that is organized under the laws of a state other than Montana or under the laws of any foreign country.

(7) "Foreign limited liability company" means an entity that is:

(a) an unincorporated association;

(b) organized under laws of a state other than Montana or under the laws of any foreign country;

(c) organized under a statute pursuant to which an

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association may be formed that affords to each of its members limited liability with respect to the liabilities of the entity; and

(d) not required to be registered or organized under any statute of this state other than [sections 1 through 78].

(8) "Foreign limited partnership" means a limited partnership formed under the laws of any state other than Montana or under the laws of any foreign country.

(9) "Foreign professional limited liability company" means a limited liability company organized for the purpose of rendering professional services under the laws of any state other than Montana.

(10) "Licensing authority" means an officer, board, agency, court, or other authority in this state that has the power to issue a license or other legal authorization to render a professional service.

(11) "Limited liability company" or "domestic limited liability company" means an organization that is formed under [sections 1 through 78].

(12) "Limited liability company interest" or "interest in the limited liability company" means the interest that can be assigned under [section 41] and that is available to creditors under [section 42].

(13) "Limited partnership" means a limited partnership

formed under the laws of this state or a foreign limited partnership.

(14) "Manager" means, with respect to a limited liability company that has set forth in its articles of organization that it is to be managed by managers, the person designated in accordance with [section 21].

(15) "Member" means a person who has been admitted to membership in a limited liability company as provided in [section 44] and who has not dissociated from the limited liability company.

(16) "Operating agreement" means an agreement, written or oral, as to the conduct of the business and affairs of a limited liability company that is binding upon all of the members.

(17) "Person" means an individual, a general partnership, a limited partnership, a domestic or foreign limited liability company, a trust, an estate, an association, a corporation, or any other legal or commercial entity.

(18) "Professional limited liability company" means a limited liability company designating itself as a professional limited liability company in its articles of organization.

(19) "Professional service" means a service that may lawfully be rendered only by persons licensed under a

licensing law of this state and that may not be lawfully rendered by a limited liability company that is not a professional limited liability company.

(20) "Qualified person" means a natural person, limited liability company, general partnership, or professional corporation eligible under [sections 1 through 78] to own shares issued by a professional limited liability company.

(21) "State" means a state, territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(22) "Surviving limited liability company" means the constituent entity surviving the merger, as identified in the articles of merger provided for in [section 71].

NEW SECTION. **Section 3. Name.** (1) The name of each limited liability company as set forth in its articles of organization must contain the words "limited liability company" or "limited company" or the abbreviations "l.l.c.", "l.c.", "llc", or "lc". The word "limited" may be abbreviated as "ltd.", and the word "company" may be abbreviated as "co.".

(2) A limited liability company name must be distinguishable on the records of the secretary of state from:

(a) the name of any business corporation, nonprofit corporation, limited partnership, or limited liability

company organized or reserved under the laws of this state;

(b) the name of any foreign business corporation, foreign nonprofit corporation, foreign limited partnership, or foreign limited liability company registered or qualified to do business in this state;

(c) any assumed business name, limited partnership name, trademark, service mark, or other name registered or reserved with the secretary of state; and

(d) the corporate name of a domestic corporation that has dissolved but only for a period of 120 days after the effective date of its dissolution.

(3) Contests over names registered under this section are governed by 35-1-310.

NEW SECTION. **Section 4. Reservation of name.** (1) The exclusive right to use a name may be reserved by:

(a) a person intending to organize a limited liability company and to adopt that name;

(b) a limited liability company or foreign limited liability company registered in this state that intends to adopt that name;

(c) a foreign limited liability company intending to register in this state and to adopt that name; or

(d) a person intending to organize a foreign limited liability company and to have it registered in this state and to adopt that name.

(2) The reservation must be made by filing with the secretary of state an application, executed by the applicant, to reserve a specified name. If the secretary of state finds that the name is available for use by a domestic or foreign limited liability company, the secretary of state shall reserve the name for the exclusive use of the applicant for a nonrenewable period of 120 days from the date the application is filed.

(3) The holder of a reserved limited liability company name may renew the reservation for successive periods of 120 days each from the date of renewal.

(4) The right to the exclusive use of a reserved name may be transferred to another person by filing with the secretary of state a notice of the transfer, executed by the applicant for whom the name was reserved, and by specifying the name to be transferred and the name and address of the transferee. The transfer may not extend the term during which the name is reserved.

NEW SECTION. **Section 5.** **Registered office and registered agent.** (1) A limited liability company shall continuously maintain in this state:

(a) a registered office that may but need not be the same as its place of business; and

(b) a registered agent for service of process (at the registered office) on the limited liability company that is

either an individual resident of this state, a domestic corporation, a limited liability company, or a foreign corporation or foreign limited liability company authorized to transact business in this state.

(2) Unless the registered agent signed the document making the appointment, the appointment of a registered agent or a successor registered agent on whom process may be served is not effective until the agent delivers a statement in writing to the secretary of state accepting the appointment.

(3) A limited liability company may change its registered office or registered agent, or both, by delivering to the secretary of state a statement setting forth:

(a) the name of the limited liability company;

(b) the address of its current registered office;

(c) if the address of its registered office is to be changed, the new address of the registered office;

(d) the name and address of its current registered agent; and

(e) if its registered agent or the agent's address is to be changed, the name and address of the successor registered agent or the current registered agent's new address.

(4) The change of address of the registered office or

registered agent is effective on delivery of the statement to the secretary of state. The appointment of a new registered agent is effective on delivery of the statement to the secretary of state and on receipt by the secretary of state of evidence that the new registered agent has accepted appointment pursuant to subsection (2).

(5) A registered agent of a limited liability company may resign as registered agent by delivering a written notice and 2 copies to the secretary of state. The secretary of state shall mail a copy of the notice to the limited liability company at its registered office and its principal place of business. The appointment of the registered agent terminates 30 days after receipt of the notice by the secretary of state or on the appointment of a new registered agent, whichever occurs first.

(6) If a registered agent changes its address to another place in this state, it may change the address by delivering a statement to the secretary of state as required by subsection (3), except that it need be signed only by the registered agent. The statement must recite that a copy of the statement has been mailed to the limited liability company.

NEW SECTION. **Section 6.** Purpose. (1) A limited liability company organized under [sections 8 through 18] has the purpose of engaging in any lawful business unless a

more limited purpose is set forth in the articles of organization.

(2) Limited liability companies may be organized under [sections 8 through 18] for any lawful purpose except for the purpose of banking or insurance.

NEW SECTION. **Section 7.** Powers. A limited liability company may:

(1) sue, be sued, complain, and defend in all courts;

(2) transact its business, carry on its operations, and have and exercise the powers granted by this section in any state; in any territory, district, or possession of the United States; and in any foreign country;

(3) make contracts and guarantees, incur liabilities, and borrow money;

(4) sell, lease, exchange, transfer, convey, mortgage, pledge, and otherwise dispose of any of its assets;

(5) acquire by purchase or in any other manner, take, receive, own, hold, improve, and otherwise deal with any interest in real or personal property, wherever located;

(6) issue notes, bonds, and other obligations and secure any of them by mortgage, deed of trust, or security interest of any of its assets;

(7) purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, loan, pledge, or otherwise dispose of and

otherwise use and deal in and with stock or other interests in and obligations of domestic and foreign corporations, associations, general or limited partnerships, limited liability companies, business trusts, and individuals;

(8) invest its surplus funds, lend money from time to time in any manner that may be appropriate to enable it to carry on the operations or fulfill the purposes set forth in its articles of organization, and take and hold real property and personal property as security for the payment of funds loaned or invested;

(9) elect or appoint agents and define their duties and fix their compensation;

(10) sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets;

(11) be a promoter, stockholder, partner, member, associate, or agent of any corporation, partnership, domestic or foreign limited liability company, joint venture, trust, or other enterprise;

(12) indemnify and hold harmless any member, agent, or employee from and against any claims and demands whatsoever, except in the case of action or failure to act by the member, agent, or employee that constitutes willful misconduct or recklessness, and subject to the standards and restrictions, if any, set forth in the articles of

organization or operating agreement;

(13) cease its activities and dissolve;

(14) pay pensions and establish pension plans, pension trusts, profit-sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any of its current or former directors, officers, employees, and agents;

(15) make donations for the public welfare or for charitable, religious, scientific, or educational purposes and, in time of war, make donations in aid of war activities; and

(16) do every other act not inconsistent with law that is appropriate to promote and further the business and affairs of the limited liability company.

NEW SECTION. **Section 8. Formation.** One or more persons may form a limited liability company by signing and filing articles of organization with the secretary of state. The person or persons need not be members of the limited liability company at the time of formation or after formation has occurred.

NEW SECTION. **Section 9. Articles of organization.** (1) The articles of organization must set forth:

(a) the name of the limited liability company that satisfies the requirements of [section 3];

(b) the latest date on which the limited liability

company is to dissolve;

(c) the address of its principal place of business in this state and, if different, its registered office and the name and address of its resident agent at the registered office in this state;

(d) a statement of whether the limited liability company is to be managed by a manager or by its members;

(e) (i) if the limited liability company is to be managed by a manager or managers, a statement that the company is to be managed in that fashion and the names and street addresses of managers who are to serve as managers until the first meeting of members or until their successors are elected;

(ii) if the management of a limited liability company is reserved to the members, the names and street addresses of the initial members;

(f) if the limited liability company is a professional limited liability company, a statement to that effect and a statement of the professional service or services it will render; and

(g) any other provision, not inconsistent with law, that the members elect to set out in the articles, including but not limited to a statement of whether there are limitations on the authority of members or management to bind the limited liability company.

(2) It is not necessary to set out in the articles of organization any of the powers enumerated in [section 7].

NEW SECTION. **Section 10. Amendment of articles of organization -- restatement.** (1) The articles of organization of a limited liability company are amended by filing articles of amendment with the secretary of state. The articles of amendment must set forth:

(a) the name of the limited liability company;

(b) the date the articles of organization were filed; and

(c) the amendment to the articles of organization.

(2) The articles of organization may be amended as desired, so long as the amended articles of organization contain only provisions that may be lawfully contained in articles of organization at the time of making the amendment.

(3) Articles of organization may be restated at any time. Restated articles of organization must be filed with the secretary of state, must be specifically designated as such in the heading, and must state either in the heading or in an introductory paragraph the limited liability company's present name and, if it has been changed, all of its former names and the date of the filing of its articles of organization.

(4) An amendment to the articles of organization of a

limited liability company must be in the form and manner designated by the secretary of state.

NEW SECTION. **Section 11.** **Execution of documents.** (1) Unless otherwise specified in [sections 1 through 78], a document required by [sections 1 through 78] to be filed with or delivered to the secretary of state must be executed:

(a) by any manager if management of the limited liability company is vested in one or more managers or by a member if management of the limited liability company is reserved to the members;

(b) if the limited liability company has not been formed, by the person or persons forming the limited liability company; or

(c) if the limited liability company is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary.

(2) The person executing the document shall sign it and state, beneath or opposite the signature, the person's name and the capacity in which the person signs.

(3) The person executing the document may do so as an attorney-in-fact. Powers of attorney relating to the execution of the document do not need to be shown to or filed with the secretary of state.

NEW SECTION. **Section 12.** **Filing with secretary of**

state. (1) The original signed copy, together with a duplicate copy that may be either a signed, photocopied, or confirmed copy, of the articles of organization or any other document required to be filed pursuant to [sections 1 through 78] must be delivered to the secretary of state. If the secretary of state determines that the documents conform to the filing provisions of [sections 1 through 78], the secretary of state shall, when all required filing fees have been paid:

(a) endorse on each signed original and duplicate copy the word "filed" and the date and time of its acceptance for filing;

(b) retain the signed original in the secretary of state's files; and

(c) return the duplicate copy to the person who filed it or to the person's representative.

(2) If the secretary of state is unable to make the determination required for filing by subsection (1) at the time any documents are delivered for filing, the documents are considered to have been filed at the time of delivery if the secretary of state subsequently determines that the documents as delivered conform to the filing provisions of [sections 8 through 18].

NEW SECTION. **Section 13.** **Effect of delivery or filing of articles of organization.** (1) A limited liability company

is formed when the articles of organization are delivered to the secretary of state for filing.

(2) Each copy of the articles of organization stamped "filed" and marked with the filing date is conclusive evidence that all conditions precedent required to be performed by the organizers have been complied with and that the limited liability company has been legally organized and formed under [sections 1 through 78].

NEW SECTION. **Section 14.** **Filing of facsimile copy.** (1) The secretary of state may treat a facsimile copy of a document that is required to be filed under [sections 1 through 78] and the signatures on the facsimile copy in the same manner as an original for purposes of [sections 1 through 78], provided that the secretary of state receives the original document within 5 working days of the receipt of the facsimile copy. If all other requirements are met, the date of filing relates back to the date of receipt of the facsimile copy. A facsimile copy may be filed under this section if it:

(a) is produced by a method of transmission of images in which the image is scanned at the transmitter, reconstructed at the receiving station, and duplicated on paper at the receiving station; and

(b) is legible and the same size as the original.

(2) During the 5-day period referred to in subsection

(1), the recorded facsimile copy constitutes constructive notice for all purposes of the original document.

(3) If the original document is not received within 5 working days of receipt of the facsimile copy as provided in subsection (1), the filing of the facsimile copy is void.

(4) A person who files a false document by facsimile copy is liable to the party aggrieved for three times the amount of damages resulting from the filing of the false document.

NEW SECTION. **Section 15.** **Annual report for secretary of state.** (1) A limited liability company or a foreign limited liability company authorized to transact business in this state shall deliver to the secretary of state, for filing, an annual report that sets forth:

(a) the name of the limited liability company and the state or country under whose law it is organized;

(b) the mailing address and, if different, street address of its registered office and the name of its registered agent at that office in this state;

(c) the address of its principal office;

(d) (i) if the limited liability company is managed by a manager or managers, a statement that the company is managed in that fashion and the names and street addresses of the managers;

(ii) if the management of a limited liability company is

reserved to the members, a statement to that effect;

(e) the last date upon which the limited liability company is to be dissolved;

(f) if the limited liability company is a professional limited liability company, a statement that all of its members and not less than one-half of its managers are qualified persons with respect to the limited liability company.

(2) Information in the annual report must be current as of the date the annual report is executed on behalf of the limited liability company.

(3) The first annual report must be delivered to the secretary of state between January 1 and April 15 of the year following the calendar year in which a domestic limited liability company is organized or a foreign limited liability company is authorized to transact business. Subsequent annual reports must be delivered to the secretary of state between January 1 and April 15.

(4) If an annual report does not contain the information required by this section, the secretary of state shall promptly notify the reporting domestic or foreign limited liability company in writing and return the report to it for correction.

(5) The annual report must be executed by at least one member of the limited liability company and must include the

street address of the member.

(6) A domestic professional limited liability company or a foreign professional limited liability company authorized to transact business in this state shall annually file before April 15, with each licensing authority having jurisdiction over a professional service of a type described in its articles of organization, a statement of qualification setting forth the names and addresses of the members and managers of the company and additional information that the licensing authority may by rule prescribe as appropriate in determining whether the company is complying with the provisions of [sections 72 through 78] and rules promulgated under [sections 72 through 78]. The licensing authority may charge a fee to cover the cost of filing a statement of qualification.

NEW SECTION. **Section 16. Administrative dissolution -- rules.** (1) A domestic limited liability company may be dissolved involuntarily by order of the secretary of state if the limited liability company has failed:

(a) for 60 days after change of its registered office or registered agent to file in the office of the secretary of state a statement of the change;

(b) for 140 days to file its annual report within the time required by law; or

(c) to remit any fees required by law.

(2) The secretary of state may adopt rules to establish procedures for administrative dissolutions consistent with subsection (1).

NEW SECTION. **Section 17.** **Reinstatement of dissolved limited liability company.** (1) The secretary of state may:

(a) reinstate a limited liability company that has been dissolved under the provisions of [section 16];

(b) restore to a reinstated limited liability company its right to carry on business in this state and to exercise all of its privileges and immunities.

(2) A limited liability company applying for reinstatement shall submit to the secretary of state one original and one copy of the application, executed by a person who was a member at the time of dissolution, setting forth:

(a) the name of the limited liability company;

(b) a statement that the assets of the limited liability company have not been liquidated;

(c) a statement that a majority of its members have authorized the application for reinstatement; and

(d) if its name has been legally acquired by another entity prior to its application for reinstatement, the name under which the limited liability company desires to be reinstated.

(3) The limited liability company shall submit with its

application for reinstatement a certificate from the department of revenue stating that all taxes imposed pursuant to Title 15 have been paid.

(4) When all requirements are met and the secretary of state reinstates the limited liability company to its former rights, the secretary of state shall:

(a) conform and file in the office of the secretary of state reports, statements, and other instruments submitted for reinstatement;

(b) immediately issue and deliver to the reinstated limited liability company a certificate of reinstatement authorizing it to transact business; and

(c) upon demand, issue to the limited liability company one or more certified copies of the certificate of reinstatement.

(5) The secretary of state may not order a reinstatement if 5 years have elapsed since the dissolution.

(6) A restoration of limited liability company rights pursuant to this section relates back to the date the limited liability company was involuntarily dissolved, and the limited liability company is considered to have been an existing legal entity from the date of its original organization.

NEW SECTION. **Section 18.** **Fees for filing, copying, and services -- rules.** (1) The secretary of state shall

establish by rule fees for filing documents as required by [sections 1 through 78].

(2) The secretary of state shall establish by rule fees for copying documents, priority handling, transmitting or filing facsimile copies, and providing computer-generated information.

(3) The fees prescribed under this section must be reasonably related to the costs of processing the documents and preparing and providing the services. The secretary of state shall maintain records sufficient to support the fees established under this section.

NEW SECTION. **Section 19.** License fee. (1) In addition to the filing fee authorized by [section 18], the secretary of state shall charge and collect from each foreign limited liability company a license fee of $50 at the time of filing its articles of organization.

(2) In addition to the filing fee authorized by [section 18], the secretary of state shall charge and collect from each foreign limited liability company a license fee of $50 at the time of filing an application for a certificate of authority to transact business.

NEW SECTION. **Section 20.** Agency power of members and managers. (1) Except as provided in subsection (2), a member is an agent of the limited liability company for the purpose of its business or affairs and the act of a member,

including but not limited to the execution of any instrument in the name of the limited liability company for apparently carrying on in the usual way the business or affairs of the limited liability company binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom the member is dealing has knowledge of the fact that the member has no such authority.

(2) If the articles of organization provide that management of the limited liability company is vested in a manager or managers:

(a) a member, acting solely in the capacity as a member, may not be an agent of the limited liability company; and

(b) a manager is an agent of the limited liability company for the purpose of its business or affairs and the act of a manager, including but not limited to the execution of any instrument in the name of the limited liability company for apparently carrying on in the usual way the business or affairs of the limited liability company binds the limited liability company, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the

manager has no such authority.

(3) An act of a manager or a member that is not apparently for carrying on in the usual way the business of the limited liability company does not bind the limited liability company, unless authorized in accordance with the articles of organization or the operating agreement, at the time of the transaction or at any other time.

(4) An act of a manager or member in contravention of a restriction on authority may not bind the limited liability company to persons having knowledge of the restriction.

NEW SECTION. **Section 21. Admissions of members and managers.** (1) Except as provided in subsection (2), an admission or representation made by a member concerning the business or affairs of a limited liability company within the scope of the member's authority as provided for by [sections 1 through 78] is evidence against the limited liability company.

(2) If the articles of organization provide that management of the limited liability company is vested in a manager or managers:

(a) an admission or representation made by a manager concerning the business or affairs of a limited liability company within the scope of the manager's authority, as provided for by [sections 1 through 78], is evidence against the limited liability company; and

(b) the admission or representation of a member, acting solely in the capacity as a member, may not constitute evidence.

NEW SECTION. **Section 22. Limited liability company charged with knowledge of or notice to member or manager.** (1) Except as provided in subsection (2), notice to a member of any matter relating to the business or affairs of the limited liability company and the knowledge of the member acting in the particular matter, acquired while a member or of which the member had knowledge at the time of becoming a member, and the knowledge of any other member who reasonably could and should have communicated it to the acting member operate as notice to or knowledge of the limited liability company, except in the case of a fraud on the limited liability company committed by or with the consent of that member.

(2) If the articles of organization provide that management of the limited liability company is vested in a manager or managers:

(a) notice to a manager of any matter relating to the business or affairs of the limited liability company and the knowledge of the manager acting in the particular matter, acquired while a manager or of which the manager had knowledge at the time of becoming a manager, and the knowledge of any other manager who reasonably could and

should have communicated it to the acting manager operate as notice to or knowledge of the limited liability company, except in the case of a fraud on the limited liability company committed by or with the consent of that manager; and

(b) notice to or knowledge of a member of a limited liability company while the member is acting solely in the capacity as a member is not notice to or knowledge of the limited liability company.

NEW SECTION. **Section 23.** **Liability of members to third parties.** A person who is a member or manager, or both, of a limited liability company is not liable, solely by reason of being a member or manager, or both, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company.

NEW SECTION. **Section 24.** **Management.** (1) Unless the articles of organization vest management of the limited liability company in a manager or managers, management of the business or affairs of the limited liability company is vested in the members. Subject to any provisions in the articles of organization, the operating agreement, or [sections 1 through 78] restricting or enlarging the

management rights and duties of any person, group, or class of persons, the members may manage the affairs of the limited liability company and make all necessary decisions.

(2) If the articles of organization vest management of the limited liability company in one or more managers, the managers may manage the business or affairs of the limited liability company as provided in the articles of organization or operating agreement. Unless otherwise provided in the articles of organization or an operating agreement, the managers:

(a) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of more than one-half of the members;

(b) need not be members of the limited liability company or natural persons; and

(c) unless they have been earlier removed or have earlier resigned, shall hold office until their successors are elected and qualified.

NEW SECTION. **Section 25.** **Duties of members and managers.** (1) Subject to contrary provision of articles of organization or an operating agreement, a member or manager is not liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or for failure to act on behalf of the limited liability company

unless the act or omission constitutes gross negligence or willful misconduct.

(2) Each member and manager shall account to the limited liability company and hold as trustee for it any profit or benefit derived by the member or manager without the consent of a majority of the disinterested members or managers or other persons participating in the management of the business or affairs of the limited liability company from:

(a) any transaction connected with the conduct or winding up of the limited liability company; or

(b) any use by the member or manager of its property, including but not limited to confidential or proprietary information of the limited liability company or other matters entrusted to the member or manager as a result of the member's or manager's status as member or manager.

(3) A member who is not also a manager of a limited liability company in which management is vested in managers under [section 24] has no duty to the limited liability company or to the other members solely by reason of acting in the capacity as a member.

NEW SECTION. **Section 26.** Voting. (1) Except as provided in the articles of organization, the operating agreement, or [sections 1 through 78] and subject to subsection (2), the affirmative vote, approval, or consent

of more than one-half of the members, if management of the limited liability company is vested in the members, or of the managers or other persons vested with the management of the limited liability company, if the management of the limited liability company is vested in the managers or persons, is required to decide any matter connected with the business.

(2) Except as provided in writing in the articles of organization or the operating agreement, the affirmative vote, approval, or consent of all members is required to:

(a) amend the articles of organization or a written operating agreement; or

(b) authorize a member, manager, or other person to do any act on behalf of the limited liability company that contravenes the articles of organization or a written operating agreement, including any written provision of the articles of organization or a written operating agreement that expressly limits the purpose, business, or affairs of the limited liability company or its conduct.

NEW SECTION. **Section 27.** Limitation of liability and indemnification of members and managers. (1) Subject to subsection (2), the articles of organization or operating agreement may:

(a) eliminate or limit the personal liability of a member or a manager for monetary damages for breach of any

duty provided for in [section 25]; and

(b) provide for indemnification of the member or the manager for judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which an individual is a party because the individual is or was a member or a manager.

(2) A provision permitted under subsection (1) may not limit or eliminate the liability of a member or a manager for:

(a) the amount of a financial benefit received by a member or a manager to which the member or the manager is not entitled;

(b) an intentional infliction of harm by the member or the manager on the limited liability company or its members;

(c) an intentional violation of criminal law by the member or the manager; or

(d) an unlawful distribution by the member or the manager.

NEW SECTION. **Section 28.** Records and information. (1) Unless otherwise provided in the articles of organization or a written operating agreement, a limited liability company shall keep at its principal place of business the following:

(a) a current and past list, setting forth the full name and last-known mailing address of each member and manager, if any, set forth in alphabetical order;

(b) a copy of the articles of organization and all amendments to the articles, together with executed copies of any powers of attorney pursuant to which any articles have been executed;

(c) copies of the limited liability company's federal, state, and local income tax returns and financial statements, if any, for the 3 most recent years or, if the returns and statements were not prepared for any reason, copies of the information and statements provided to or that should have been provided to the members to enable them to prepare their federal, state, and local tax returns for the period;

(d) copies of any effective written operating agreements and all amendments and copies of any written operating agreements no longer in effect;

(e) unless provided in writing in an operating agreement:

(i) a writing, if any, setting forth the amount of cash, the agreed value of other property or services contributed by each member, and the times or events upon which any additional contributions agreed to by each member are to be made;

(ii) a writing, if any, stating events that require the limited liability company to be dissolved and its affairs wound up; and

(iii) other writings, if any, prepared pursuant to a requirement in an operating agreement.

(2) A member may, at the member's own expense, inspect and copy any limited liability company record, wherever the record is located, upon reasonable request during ordinary business hours.

(3) Members, if the management of the limited liability company is vested in the members, or managers, if management of the limited liability company is vested in the managers, shall render, to the extent the circumstances make it just and reasonable, true and full information of all things affecting the members to any member and to the legal representative of any deceased member or of any member under legal disability.

(4) Failure of the limited liability company to keep or maintain any of the records or information required pursuant to this section may not be grounds for imposing liability on any person for the debts and obligations of the limited liability company.

NEW SECTION. **Section 29. Contributions to capital.** An interest in a limited liability company may be issued in exchange for property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

NEW SECTION. **Section 30. Liability for contribution.**

(1) A promise by a member to contribute to the limited liability company is not enforceable unless set out in a writing signed by the member.

(2) (a) Except as provided in the articles of organization or the operating agreement, a member is obligated to the limited liability company to perform any enforceable promises to contribute cash or property or to perform services even if the member is unable to perform because of death, disability, or other reason.

(b) If a member does not make the required contribution of property or services, the member is obligated, at the option of the limited liability company, to contribute cash equal to that portion of value or the stated contribution that has not been made.

(3) (a) Unless otherwise provided in the articles of organization or the operating agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of [sections 1 through 78] may be compromised only with the unanimous consent of the members.

(b) Notwithstanding the compromise, the original obligation may be enforced by a creditor of a limited liability company who extends credit or otherwise acts in reliance on the obligation after the member signs a writing that reflects the obligation and before the amendment or

compromise.

NEW SECTION. **Section 31.** Sharing of profits and losses. Unless otherwise provided in the articles of organization or a written operating agreement, each member must be repaid that member's contributions to capital and share equally in the profits, losses, and surpluses remaining after all liabilities, including those to members, are satisfied.

NEW SECTION. **Section 32.** Sharing of distributions. Except as provided in [sections 33 and 50], distributions of cash or other assets of a limited liability company must be shared among the members and among classes of members in the manner provided in writing in the articles of organization or the operating agreement. If the articles of organization or the operating agreement does not so provide in writing, each member shall share equally in any distribution. A member is entitled to receive distributions described in this section from a limited liability company to the extent and at the times or upon the happening of the events specified in the articles of organization or the operating agreement or at the times determined by the members or managers pursuant to [section 26].

NEW SECTION. **Section 33.** Distributions on event of dissociation. Upon the occurrence of an event of dissociation under [section 45] that does not cause

dissolution, a dissociating member is entitled to receive:

(1) any distribution to which the member is entitled under the articles of organization or the operating agreement; and

(2) if not otherwise provided in the articles of organization or the operating agreement, within a reasonable time after dissociation, the fair value of the member's interest in the limited liability company as of the date of dissociation based upon the member's right to share in distributions from the limited liability company.

NEW SECTION. **Section 34.** Distribution in kind. Except as provided in the articles of organization or the operating agreement:

(1) a member, regardless of the nature of the member's contribution, may not demand or receive any distribution from a limited liability company in any form other than cash; and

(2) a member may not be compelled to accept from a limited liability company a distribution of any asset in kind to the extent that the percentage of the asset distributed to the members exceeds a percentage of that asset that is equal to the percentage in which the member shares in distributions from the limited liability company.

NEW SECTION. **Section 35.** Distributions. (1) A distribution may not be made if, after giving effect to the

distribution:

(a) the limited liability company would not be able to pay its debts as they become due in the usual course of business; or

(b) the limited liability company's total assets would be less than the sum of its total liabilities plus, unless the articles of organization or the operating agreement provides otherwise, the amount that would be needed, if the limited liability company were to be dissolved at the time of the distribution, to satisfy the preferential rights of other members upon dissolution that are superior to the rights of the member receiving the distribution.

(2) The limited liability company may base a determination that a distribution is not prohibited under subsection (1) on either:

(a) financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances; or

(b) a fair valuation or other method that is reasonable under the circumstances.

(3) Except as provided in subsection (5), the effect of a distribution under subsection (1) is measured as of:

(a) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization; or

(b) the date payment is made if it occurs more than 120 days after the date of authorization.

(4) A limited liability company's indebtedness to a member incurred by reason of a distribution to be made to that member in accordance with this section is at parity with the limited liability company's indebtedness to its general unsecured creditors, except as otherwise provided by agreement.

(5) For purposes of this section:

(a) if terms of indebtedness provide that payment of principal and interest is to be made only if and to the extent that payment of a distribution to members could then be made under this section, indebtedness of a limited liability company, including indebtedness issued as a distribution, is not a liability for purposes of determinations made under subsection (2); and

(b) if the indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is actually made.

NEW SECTION. **Section 36.** **Liability upon wrongful distribution.** (1) A member or manager who votes for or assents to a distribution in violation of the articles of organization, the operating agreement, or [section 35] is personally liable to the limited liability company, but not

to other persons, for the amount of the distribution that exceeds what could have been distributed without violating [section 35] or the articles of organization or the operating agreement if it is established that the member or manager did not act in compliance with [section 35].

(2) A member or manager held liable under subsection (1) for an unlawful distribution is entitled to contribution:

(a) from each other member or manager who voted for or assented to the unlawful distribution; and

(b) from each member for the amount the member received, knowing that the distribution was made in violation of [section 35] or the articles of organization or the operating agreement.

NEW SECTION. **Section 37.** **Right to distribution.** Subject to [section 50], when a member becomes entitled to receive a distribution, the member has the status of and is entitled to all remedies available to a creditor of the limited liability company with respect to the distribution.

NEW SECTION. **Section 38.** **Ownership of limited liability company property.** (1) Property transferred to or otherwise acquired by a limited liability company becomes property of the limited liability company. A member has no interest in specific limited liability company property.

(2) Property may be acquired, held, and conveyed in the

name of the limited liability company. Any estate in real property may be acquired in the name of the limited liability company, and title to any estate acquired must vest in the limited liability company rather than in the members individually.

NEW SECTION. **Section 39.** **Transfer of real property.** (1) Except as provided in subsection (5), title to property of the limited liability company that is held in the name of the limited liability company may be transferred by an instrument of transfer executed by any member in the name of the limited liability company.

(2) Title to property of the limited liability company that is held in the name of one or more members or managers may be transferred by an instrument of transfer executed by the persons in whose name title is held if there is an indication in the instrument transferring title to the property to them of:

(a) their capacity as members or managers of a limited liability company; or

(b) the existence of a limited liability company, even if the name of the limited liability company is not indicated.

(3) Property transferred under subsection (1) or (2) may be recovered by the limited liability company if it proves that the act of the person executing the instrument

of transfer did not bind the limited liability company under [section 20] unless the property has been transferred by the initial transferee or a person claiming through the initial transferee to a subsequent transferee who gives value without having notice that the person who executed the instrument of initial transfer lacked authority to bind the limited liability company.

(4) Title to property of the limited liability company may be transferred free of any claims of the limited liability company or its members by the persons in whose name title is held to a transferee who gives value without having notice that it is property of a limited liability company if title is held in the name of one or more persons other than the limited liability company and there is no indication in the instrument transferring title to the property to them of:

(a) their capacity as members or managers of a limited liability company; or

(b) the existence of a limited liability company.

(5) If the articles of organization provide that management of the limited liability company is vested in a manager or managers:

(a) title to property of the limited liability company that is held in the name of the limited liability company may be transferred by an instrument of transfer executed by

any manager in the name of the limited liability company; and

(b) a member, acting solely in the capacity of a member, may not transfer title as provided in subsection (5)(a).

NEW SECTION. **Section 40. Nature of membership interest.** A membership interest is personal property.

NEW SECTION. **Section 41. Assignment of membership interest.** (1) Except as provided in writing in the articles of organization or an operating agreement:

(a) a membership interest is assignable in whole or in part;

(b) an assignment entitles the assignee to receive, to the extent assigned, only the distributions to which the assignor would be entitled;

(c) an assignment of a membership interest does not of itself dissolve the limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights of a member;

(d) until the assignee of a limited liability company interest becomes a member, the assignor continues to be a member and to have the power to exercise rights of a member, subject to the members' right to remove the assignor pursuant to [section 45(1)(c)(ii)];

(e) until an assignee of a membership interest becomes a member, the assignee has no liability as a member solely as a result of the assignment; and

(f) the assignor of a membership interest is not released from liability as a member solely as a result of the assignment.

(2) The articles of organization or an operating agreement may provide that a member's interest in a limited liability company may be evidenced by a certificate of membership interest issued by the limited liability company and may also provide for the assignment or transfer of a membership interest represented by a certificate and make other provisions with respect to the certificates.

(3) Unless otherwise provided in the articles of organization or an operating agreement, the pledge or granting of a security interest, lien, or other encumbrance in or against any of the membership interest of a member is not an assignment and may not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member.

NEW SECTION. **Section 42. Rights of judgment creditor.** On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment, with interest. To the extent

charged, the judgment creditor has only the rights of an assignee of the membership interest. [Sections 1 through 78] does not deprive a member of the benefit of any exemption laws applicable to a membership interest.

NEW SECTION. **Section 43. Right of assignee to become member.** (1) Except as otherwise provided in the articles of organization or a written operating agreement, an assignee of an interest in a limited liability company may become a member only if the other members unanimously consent.

(2) An assignee who becomes a member has, to the extent assigned, the rights and powers of and is subject to the restrictions and liabilities of a member under the articles of organization, an operating agreement, and [sections 1 through 78]. An assignee who becomes a member is liable for obligations of the assignor to make contributions and to return distributions under [section 30]; however, the assignee is not obligated for liabilities of which the assignee had no knowledge at the time the assignee became a member and that could not be ascertained from the articles of organization or a written operating agreement.

(3) Whether or not an assignee of a membership interest becomes a member, the assignor is not released from liability to the limited liability company under [section 30].

(4) Except as otherwise provided in writing in the

articles of organization or the operating agreement, a member who assigns the member's entire interest in the limited liability company ceases to be a member and to have the power to exercise any rights of a member when the assignee becomes a member with respect to the assigned interest.

NEW SECTION. **Section 44. Admission of members.** (1) Subject to subsection (2), a person may become a member in a limited liability company:

(a) in the case of a person acquiring a limited liability company interest directly from the limited liability company, upon compliance with the articles of organization or the operating agreement or, if the articles of organization or the operating agreement does not so provide in writing, upon the written consent of all members; and

(b) in the case of an assignee of a limited liability company interest, as provided in [section 41].

(2) The effective time of admission of a member to a limited liability company is the later of:

(a) the date the limited liability company is formed; or

(b) the time provided in the articles of organization or the operating agreement or, if no time is provided, when the person's admission is reflected in the records of the

limited liability company.

NEW SECTION. **Section 45. Events of dissociation.** (1) A person ceases to be a member of a limited liability company upon the occurrence of one or more of the following events:

(a) the member withdraws by voluntary act from the limited liability company as provided in subsection (3);

(b) the member ceases to be a member of the limited liability company as provided in [section 43];

(c) the member is removed as a member:

(i) in accordance with the articles of organization or the operating agreement; or

(ii) subject to contrary written provisions in the articles of organization or the operating agreement, by an affirmative vote of a majority of the members who have not assigned their interests when the member assigns all the member's interest in the limited liability company;

(d) subject to contrary written provisions in the articles of organization or the operating agreement or written consent of all members at the time, the member:

(i) makes an assignment for the benefit of creditors;

(ii) files a voluntary petition in bankruptcy;

(iii) is adjudicated as bankrupt or insolvent;

(iv) files a petition or answer seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or

regulation;

(v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the member in any proceeding under subsection (1)(d); or

(vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the member or of any substantial part of the member's properties;

(e) subject to contrary written provisions in the articles of organization or the operating agreement or written consent of all members at the time if:

(i) 120 days after the commencement of any proceeding against the member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed;

(ii) within 90 days after the appointment without the member's consent or acquiescence of a trustee, receiver, or liquidator of the member or of any substantial part of the member's properties, the appointment is not vacated or stayed; or

(iii) within 90 days after the expiration of any stay, the appointment is not vacated;

(f) subject to contrary written provisions in the

articles of organization or the operating agreement or written consent of all members at the time, in the case of a member who is an individual:

(i) the member's death; or

(ii) the entry of an order by a court of competent jurisdiction adjudicating the member incompetent to manage the member's person or estate;

(g) subject to contrary written provisions in the articles of organization or the operating agreement or written consent of all members at the time, in the case of a member who is a trustee or is acting as a member by virtue of being a trustee of a trust, the termination of the trust but not merely the substitution of a new trustee;

(h) subject to contrary written provisions in the articles of organization or the operating agreement or written consent of all members at the time, in the case of a member that is a separate limited liability company, the dissolution and commencement of winding up of the separate limited liability company;

(i) subject to contrary written provisions in the articles of organization or the operating agreement or written consent of all members at the time, in the case of a member that is a corporation, the filing of articles of dissolution, or the equivalent for the corporation, or involuntary dissolution and the lapse of 90 days after

notice to the corporation of revocation without a reinstatement of its charter;

(j) subject to contrary written provisions in the articles of organization or the operating agreement or written consent of all members at the time, in the case of an estate, the distribution by the fiduciary of the estate's entire interest in the limited liability company; or

(k) if the limited liability company is a professional limited liability company, a member becomes a disqualified person.

(2) The members may provide in writing in the articles of organization or the operating agreement for other events that result in a person ceasing to be a member of the limited liability company.

(3) Unless the articles of organization or the operating agreement provides in writing that a member may not withdraw by voluntary act from a limited liability company, the member may withdraw at any time by giving 30 days' written notice to the other members or other notice required in the articles of organization or the operating agreement. Unless otherwise provided in the articles of organization or the operating agreement, in the case of a limited liability company for a definite term or particular undertaking, a withdrawal by a member before the expiration of that term is a breach of the articles of organization or

the operating agreement. If a member has the power to withdraw but the withdrawal violates a provision of the articles of organization or is a breach of the operating agreement or the withdrawal occurs as a result of otherwise wrongful conduct of the member, the limited liability company may:

(a) recover from the withdrawing member damages for violation of the articles of organization or for breach of the operating agreement, including the reasonable cost of obtaining replacement of the services the withdrawn member was obligated to perform;

(b) offset the damages against the amount otherwise distributable to the member; and

(c) pursue any other remedies provided for in the articles of organization or the operating agreement or otherwise available under applicable law.

NEW SECTION. **Section 46.** Dissolution. A limited liability company is dissolved and its affairs must be wound up when one of the following occurs:

(1) at the time or upon the occurrence of events specified in writing in the articles of organization or operating agreement;

(2) the written consent of all members;

(3) an event of dissociation of a member, unless the business of the limited liability company is continued by

the consent of all the remaining members within 90 days following the occurrence of an event of dissociation or as otherwise provided in writing in the articles of organization or operating agreement; or

(4) entry of a decree of judicial dissolution under [section 47].

NEW SECTION. **Section 47. Judicial dissolution.** On application by or for a member, a district court may order dissolution of a limited liability company, or other appropriate relief, when it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

NEW SECTION. **Section 48. Winding up.** (1) Except as otherwise provided in the articles of organization or the operating agreement, the business or affairs of the limited liability company may be wound up:

(a) by the members or managers who have authority under [section 23] to manage the limited liability company prior to dissolution; or

(b) if one or more of the members or managers have engaged in wrongful conduct or upon other cause shown, by the district court on application of any member or any member's legal representative or assignee.

(2) The persons winding up the business or affairs of the limited liability company may, in the name of and for

and on behalf of the limited liability company:

(a) prosecute and defend suits;

(b) settle and close the business of the limited liability company;

(c) dispose of and transfer the property of the limited liability company;

(d) discharge the liabilities of the limited liability company; and

(e) distribute to the members any remaining assets of the limited liability company.

NEW SECTION. **Section 49. Agency power of members or managers after dissolution.** (1) Except as provided in subsections (3) through (5), after an event causing dissolution of the limited liability company, a member may bind the limited liability company:

(a) by an act appropriate for winding up the limited liability company's affairs or completing transactions unfinished at dissolution; and

(b) by any transaction that would have bound the limited liability company, if it had not been dissolved, if the other party to the transaction does not have notice of the dissolution.

(2) The filing of the articles of dissolution is presumed to constitute notice of dissolution for purposes of subsection (1)(b).

(3) An act of a member that would not otherwise be binding on the limited liability company under subsection (1) is binding if it is authorized by the limited liability company.

(4) An act of a member that would be binding under subsection (1) or would be otherwise authorized and that is in contravention of a restriction on authority may not bind the limited liability company to persons having knowledge of the restriction.

(5) If the articles of organization vest management of the limited liability company in managers, a manager may exercise the authority of a member under subsection (1) and a member may not exercise the authority if the member is acting solely in the capacity of a member.

NEW SECTION. **Section 50.** **Distribution of assets.** Upon the winding up of a limited liability company, the assets must be distributed as follows:

(1) to creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company, whether by payment or the making of reasonable provision for payment, other than liabilities to members for distributions under [section 33 or 34];

(2) unless otherwise provided in the articles of organization or an operating agreement, to members and

former members in satisfaction of liabilities for distributions under [section 33 or 34]; and

(3) unless otherwise provided in the articles of organization or an operating agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.

NEW SECTION. **Section 51.** **Articles of dissolution.** Upon the dissolution and the commencement of winding up of the limited liability company, articles of dissolution must be filed in the office of the secretary of state and must set forth:

(1) the name of the limited liability company;

(2) the date of filing of its articles of organization and all amendments to the articles;

(3) the reason for filing the articles of dissolution;

(4) the effective date of the articles of dissolution, which must be a date certain, if they are not to be effective upon the filing;

(5) any other information that the members or managers filing the articles determine necessary;

(6) the name of the agent or agents authorized to receive service of process after dissolution of the limited liability company; and

(7) the name of the person or persons authorized to

wind up the business and authorized to execute documents on behalf of the limited liability company.

NEW SECTION. **Section 52.** Revocation of dissolution. (1) A foreign limited liability company may revoke its dissolution within 120 days of the effective date of the articles of dissolution.

(2) Revocation of dissolution must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholders' action.

(3) After the revocation of dissolution is authorized, the foreign limited liability company may revoke the dissolution by delivering to the secretary of state, for filing, articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(a) the name of the foreign limited liability company;

(b) the effective date of the dissolution that was revoked;

(c) the date that the revocation of dissolution was authorized; and

(d) a statement of the action that was taken to revoke the dissolution.

(4) Unless a delayed effective date is specified, revocation of dissolution is effective when the articles of

revocation of dissolution are filed.

(5) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution, and the foreign limited liability company resumes carrying on its business as if dissolution had never occurred.

NEW SECTION. **Section 53.** Known claims against dissolved limited liability companies. (1) A dissolved limited liability company may dispose of the known claims against it by filing articles of dissolution pursuant to [section 53) and following the procedure described in this section.

(2) The dissolved limited liability company shall notify its known claimants in writing of the dissolution at any time after the effective date of the dissolution. The written notice must:

(a) describe information that must be included in a claim;

(b) provide a mailing address where a claim may be sent;

(c) state the deadline, which may not be less than 120 days from the later of the effective date of the written notice or the filing of the articles of dissolution pursuant to [section 51], by which the dissolved limited liability company must receive the claim; and

(d) state that the claim will be barred if not received by the deadline.

(3) A claim against the dissolved limited liability company is barred:

(a) if a claimant who was given written notice under subsection (2) does not deliver the claim to the dissolved limited liability company by the deadline; or

(b) if a claimant whose claim was rejected by the dissolved limited liability company does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.

(4) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of the dissolution.

NEW SECTION. **Section 54. Unknown claims against dissolved limited liability companies.** (1) Subject to [section 53], the dissolution of a limited liability company, including dissolution by the expiration of its term, does not take away or impair any remedy available to or against the limited liability company or its members or managers for any claim or right, whether or not the claim or right existed or accrued prior to dissolution. A proceeding by or against the limited liability company may be prosecuted or defended by the limited liability company in its name. The members and managers have power to take action

as appropriate to protect the remedy, right, or claim.

(2) A claim may be enforced under [section 53] or this section:

(a) against the dissolved limited liability company, to the extent of the undistributed assets; or

(b) if the assets have been distributed in liquidation, against a member of the dissolved limited liability company, to the extent of the member's pro rata share of the claim or the corporate assets distributed to the member in liquidation, whichever is less, but a member's total liability for all claims under this section may not exceed the total amount of assets distributed to the member.

(3) Subsections (1) and (2) apply to foreign limited liability companies and their members transacting business in this state for any claims otherwise arising or accruing under Montana law.

NEW SECTION. **Section 55. Authority to transact business required.** (1) A foreign limited liability company may not transact business in this state until it obtains a certificate of authority from the secretary of state.

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1):

(a) maintaining, defending, or settling any proceeding;

(b) holding meetings of the members or managers or

carrying on other activities concerning internal affairs of the limited liability company;

(c) maintaining bank accounts;

(d) maintaining offices or agencies for the transfer, exchange, and registration of the limited liability company's own securities or maintaining trustees or depositaries with respect to those securities;

(e) selling through independent contractors;

(f) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts;

(g) creating or acquiring indebtedness, mortgages, and security interests in real or personal property;

(h) securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

(i) owning real or personal property that is acquired incident to activities described in subsection (2)(h) if the property is disposed of within 5 years after the date of acquisition, does not produce income, or is not used in the performance of a function of the limited liability company;

(j) conducting an isolated transaction that is completed within 30 days and that is not a transaction in the course of repeated transactions of a similar nature; or

(k) transacting business in interstate commerce.

(3) The list of activities in subsection (2) is not exhaustive.

NEW SECTION. **Section 56.** **Consequences of transacting business without authority.** (1) A foreign limited liability company transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

(2) The successor to a foreign limited liability company that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign limited liability company or its successor obtains a certificate of authority.

(3) A court may stay a proceeding commenced by a foreign limited liability company or its successor or assignee until it determines whether the foreign corporation or its successor or assignee requires a certificate of authority. If it determines that a certificate is required, the court may further stay the proceeding until the foreign limited liability company or its successor obtains the certificate.

(4) A foreign limited liability company is liable for a civil penalty of $5 for each day, but not to exceed a total

of $1,000 for each year, that it transacts business in this state without a certificate of authority. The attorney general may collect all penalties due under this subsection and deposit them to the general fund.

(5) Notwithstanding the provisions of subsections (1) and (2), the failure of a foreign limited liability company to obtain a certificate of authority does not impair the validity of its acts or prevent it from defending any proceeding in this state.

NEW SECTION. **Section 57.** **Application for certificate of authority.** (1) A foreign limited liability company may apply for a certificate of authority to transact business in this state by delivering an application to the secretary of state for filing. The application must set forth:

(a) the name of the foreign limited liability company or, if its name is unavailable for use in this state, a name that satisfies the requirements of [section 63];

(b) the name of the state or country under whose law it is organized;

(c) its date of organization and period of duration;

(d) the street address of its principal office;

(e) the address of its registered office in this state and the name of its registered agent at that office; and

(f) the names and usual business addresses of its current managers, if different from its members.

(2) A foreign limited liability company shall deliver with the completed application a certificate of existence or a similar document authenticated by the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign limited liability company is organized.

NEW SECTION. **Section 58.** **Registered office and registered agent of foreign limited liability company.** Each foreign limited liability company authorized to transact business in this state shall continuously maintain in this state:

(1) a registered office that may be the same as any of its places of business; and

(2) a registered agent who may be:

(a) an individual who resides in this state and whose business office is identical with the registered office; or

(b) a domestic corporation, a limited liability company, or a foreign corporation or foreign limited liability company authorized to transact business in this state.

NEW SECTION. **Section 59.** **Resignation of registered agent of foreign limited liability company.** (1) The registered agent of a foreign limited liability company may resign the agency appointment by signing and delivering to the secretary of state for filing the original and two

copies of a statement of resignation. The statement of resignation may include a statement that the registered office is also discontinued.

(2) After filing the statement, the secretary of state shall attach the filing receipt to one copy and mail the copy and receipt to the registered office if the office has not been discontinued. The secretary of state shall mail the other copy to the foreign limited liability company at its principal office address shown in its most recent annual report.

(3) The agency appointment is terminated and the registered office discontinued, if provided in the statement, 30 days after the date on which the statement was filed.

NEW SECTION. **Section 60. Change of registered office or registered agent of foreign limited liability company.** (1) A foreign limited liability company authorized to transact business in this state may change its registered office or registered agent, or both, by delivering to the secretary of state, for filing, a statement of change setting forth:

(a) the foreign limited liability company's name;

(b) the street address of its current registered office;

(c) if the address of its registered office is to be

changed, the new address of the registered office;

(d) the name and address of its current registered agent;

(e) if its registered agent or the agent's address is to be changed, the name and address of the successor registered agent or the current registered agent's new address; and

(f) the fact that after the change or changes are made, the street addresses of its registered office and the business office of its registered agent are identical.

(2) If a registered agent changes the street address of the registered agent's business office, the registered agent may change the street address of the registered office of any foreign limited liability company for which the registered agent is the registered agent by notifying the foreign limited liability company in writing of the change and signing, either manually or in facsimile, and delivering to the secretary of state, for filing, a statement of change that complies with the requirements of subsection (1) and that states that the foreign limited liability company has been notified of the change.

NEW SECTION. **Section 61. Amended certificate of authority.** (1) A foreign limited liability company authorized to transact business in this state shall obtain an amended certificate of authority from the secretary of

state if it changes:

(a) its name;

(b) the period of its duration; or

(c) the state or country of its organization.

(2) The requirements of [section 57] for obtaining an original certificate of authority apply to obtaining an amended certificate under this section.

NEW SECTION. **Section 62. Effect of certificate of authority.** (1) A certificate of authority issued by the secretary of state authorizes a foreign limited liability company to transact business in this state subject to the right of the state to revoke the certificate as provided in [sections 55 through 68].

(2) A foreign limited liability company with a valid certificate of authority has the same rights and privileges as a domestic company of similar character and, except as otherwise provided by [sections 55 through 68], is subject to the same duties, restrictions, penalties, and liabilities imposed on a domestic limited liability company of similar character.

(3) [Sections 55 through 68] do not authorize the state to regulate the organization or internal affairs of a foreign limited liability company authorized to transact business in the state.

NEW SECTION. **Section 63. Name.** A certificate of

authority may not be issued to a foreign limited liability company unless the name of the company satisfies the requirements of [section 3]. If the name of a foreign limited liability company does not satisfy the requirements of [section 3], to obtain or maintain a certificate of authority:

(1) the foreign limited liability company may add the words "limited company", the abbreviation "l.l.c.", or the abbreviation "l.c." to its name for use in this state; or

(2) if its real name is unavailable, the foreign limited liability company may use an assumed business name that is available and that satisfies the requirements of [section 15] if it files the assumed business name with the secretary of state.

NEW SECTION. **Section 64. Withdrawal of foreign limited liability company.** (1) A foreign limited liability company authorized to transact business in this state may not withdraw from this state until it obtains a certificate of withdrawal from the secretary of state.

(2) A foreign limited liability company authorized to transact business in this state may apply for a certificate of withdrawal by delivering an application to the secretary of state for filing. The application must set forth:

(a) the name of the foreign limited liability company and the name of the state or country under whose law it is

organized;

(b) that it is not transacting business in this state and that it surrenders its authority to transact business in this state;

(c) that it revokes the authority of its registered agent to accept service on its behalf and appoints the secretary of state as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this state;

(d) a mailing address to which the secretary of state may mail a copy of any process served on the secretary of state under subsection (3);

(e) a commitment to notify the secretary of state in the future of any change in its mailing address;

(f) that all taxes imposed on the foreign limited liability company by Title 15 have been paid, supported by a certificate by the department of revenue to be attached to the application to the effect that the department is satisfied from the available evidence that all taxes imposed have been paid. The issuance of the certificate does not relieve the corporation from liability for any taxes, penalties, or interest due the state of Montana.

(g) additional information as may be necessary or appropriate to enable the secretary of state to determine and assess any unpaid fees or taxes payable by the foreign

limited liability company.

(3) After the withdrawal of the foreign limited liability company is effective, service of process on the secretary of state under this section is service on the foreign limited liability company. Upon receipt of process, the secretary of state shall mail a copy of the process to the foreign limited liability company at the mailing address set forth under subsection (2).

NEW SECTION. **Section 65.** Grounds for revocation. The secretary of state may commence a proceeding under [section 66] to revoke the certificate of authority of a foreign limited liability company authorized to transact business in this state if:

(1) the foreign limited liability company does not deliver its annual report to the secretary of state within 140 days after it is due;

(2) the foreign limited liability company is without a registered agent or registered office in this state for 60 days or more;

(3) the foreign limited liability company does not inform the secretary of state under [section 5] that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance; or

(4) the secretary of state receives a duly authenticated certificate from the secretary of state or other official having custody of company records in the state or country under whose law the foreign limited liability company is organized, stating that it has been dissolved or disappeared as the result of a merger.

NEW SECTION. **Section 66. Procedure for and effect of revocation.** (1) If the secretary of state determines that one or more grounds exist under [section 65] for revocation of a certificate of authority, the secretary of state shall serve the foreign limited liability company with written notice of the secretary of state's determination.

(2) If the foreign limited liability company does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within 60 days after service of the notice is mailed, the secretary of state may revoke the foreign limited liability company's certificate of authority by signing a certificate of revocation that states the ground or grounds for revocation and the effective date of the revocation. The secretary of state shall file the original of the certificate and mail a copy to the foreign limited liability company.

(3) The authority of a foreign limited liability

company to transact business in this state ceases on the date shown on the certificate revoking its certificate of authority.

(4) The secretary of state's revocation of a foreign limited liability company's certificate of authority appoints the secretary of state as the foreign limited liability company's agent for service of process in any proceeding based on a cause of action that arose during the time the foreign limited liability company was authorized to transact business in this state. Service of process on the secretary of state under this subsection is service on the foreign limited liability company. Upon receipt of process, the secretary of state shall mail a copy of the process to the secretary of the foreign limited liability company at its principal office shown in its most recent annual report or in any subsequent communication received from the foreign limited liability company, stating the current mailing address of its principal office or, if no report or communication is on file, in its application for a certificate of authority.

(5) Revocation of a foreign limited liability company's certificate of authority does not terminate the authority of the registered agent of the foreign limited liability company.

NEW SECTION. **Section 67. Appeal from revocation.** (1) A

foreign limited liability company may appeal the secretary of state's revocation of its certificate of authority to the district court within 30 days after service of the certificate of revocation is mailed. The foreign limited liability company may appeal by petitioning the court to set aside the revocation and by attaching to the petition copies of its certificate of authority and the secretary of state's certificate of revocation.

(2) The court may summarily order the secretary of state to reinstate the certificate of authority or may take any other action the court considers appropriate.

(3) The court's final decision may be appealed as in other civil proceedings.

NEW SECTION. **Section 68. Admission of foreign professional limited liability companies -- application -- revocation.** (1) A foreign professional limited liability company is entitled to a certificate of authority to transact business in this state only if:

(a) the name of the foreign professional limited liability company meets the requirements of [section 73];

(b) the foreign professional limited liability company is organized only for purposes for which a professional limited liability company may be organized under [sections 72 through 78]; and

(c) all the members and not less than one-half of the

managers of the foreign professional limited liability company are qualified persons with respect to the foreign professional limited liability company.

(2) Notwithstanding [section 55], a foreign professional limited liability company may not be required to obtain a certificate of authority to transact business in this state unless it maintains an office in this state for the conduct of business or professional practice.

(3) The application for a certificate of authority must include a statement that all the members and not less than one-half of the managers are licensed in at least one state or territory or the District of Columbia to render a professional service described in the statement of purposes of the foreign professional limited liability company.

(4) The certificate of authority may be revoked by the secretary of state if the foreign professional limited liability company fails to comply with any provision of [sections 72 through 78]. The licensing authority shall certify to the secretary of state, from time to time, the names of all foreign professional limited liability companies that have given cause for revocation, together with the pertinent facts, and shall concurrently mail to each foreign professional limited liability company at its registered office in this state a notice that the certification has been made. A certificate of authority of a

foreign professional limited liability company may not be revoked unless there have been both 60 days' notice of intent to revoke and a failure to correct the noncompliance during the 60 days.

(5) A foreign professional limited liability company is subject to all other provisions of [sections 72 through 78] not inconsistent with this section.

NEW SECTION. **Section 69. Suits by and against limited liability company.** Suit may be brought by or against a limited liability company in its own name.

NEW SECTION. **Section 70. Authority to sue on behalf of limited liability company.** Except as otherwise provided in the articles of organization or the operating agreement, suit on behalf of the limited liability company may be brought in the name of the limited liability company by:

(1) any member or members of a limited liability company, whether or not the articles of organization vest management of the limited liability company in one or more managers who are authorized to sue by the vote of more than one-half of the members, unless the vote of all members is required under [section 26(2)], provided that in determining the vote required under [section 26], the vote of a member who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company must be excluded; or

(2) any manager or managers of a limited liability company, if the articles of organization vest management of the limited liability company in one or more managers, who are authorized to bring suit on behalf of the limited liability company by the vote required pursuant to [section 26], provided that in determining the required vote, the vote of a manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company must be excluded.

NEW SECTION. **Section 71. Merger.** (1) Pursuant to any agreement, a domestic limited liability company may merge with or into one or more limited liability companies formed under the laws of this state or any other state. The surviving limited liability company is as provided in the merger agreement.

(2) A domestic limited liability company that is not the surviving limited liability company in the merger shall file articles of dissolution that must have an effective date not later than the effective date of the merger.

(3) If, following a merger of one or more domestic limited liability companies or one or more limited liability companies formed under the laws of any other state, the surviving limited liability company is not a domestic limited liability company, there must be attached to the articles of dissolution for each domestic limited liability

company articles of merger executed by the surviving limited liability company:

(a) stating that the surviving limited liability company may be served with process in the state of Montana in any action, suit, or proceeding for the enforcement of any obligation of the domestic limited liability company;

(b) irrevocably appointing the secretary of state as the surviving limited liability company's agent to accept service of process in any action, suit, or proceeding; and

(c) specifying the address to which a copy of process must be mailed to the surviving limited liability company by the secretary of state.

(4) When the articles of dissolution required by subsection (2) have become effective, the following must be vested in and enforced against the surviving limited liability company as they were in each of the limited liability companies that merged:

(a) all of the rights, privileges, and powers of each of the limited liability companies that merged;

(b) all property, real, personal, and mixed;

(c) all debts due to any of the limited liability companies; and

(d) all other things and causes of action belonging to each of the limited liability companies.

NEW SECTION. **Section 72. Purposes of professional**

limited liability companies. Professional limited liability companies may be organized under [sections 72 through 78] only for the purpose of rendering professional services and services ancillary to professional services within a single profession, except that a professional limited liability company may be organized for the purpose of rendering professional services within two or more professions and for any purpose or purposes for which companies may be organized under [sections 1 through 78] to the extent that the combination of professional purposes or professional and business purposes is permitted by the licensing laws and rules of this state applicable to the professions.

NEW SECTION. **Section 73. Professional limited liability company name.** The name of a domestic or foreign professional limited liability company:

(1) must contain the words "professional limited liability company", "professional l.l.c.", or "p.l.l.c."; and

(2) must conform to rules promulgated by a licensing authority having jurisdiction of a professional service described in the articles of organization.

NEW SECTION. **Section 74. Professional limited liability company managers.** At least one-half of the managers of a professional limited liability company must be qualified persons with respect to the limited liability

company.

NEW SECTION. **Section 75. Membership in professional limited liability company.** (1) Only the following persons may be members of a professional limited liability company:

(a) natural persons authorized by law of this or any other state, a territory of the United States, or the District of Columbia to render a professional service permitted by the articles of organization of the professional limited liability company;

(b) general partnerships in which all the partners are authorized by law of this or any other state, a territory of the United States, or the District of Columbia to render a professional service permitted by the articles of incorporation and in which at least one partner is authorized by law in this state to render a professional service permitted by the articles of organization of the professional limited liability company; and

(c) domestic or foreign professional corporations and domestic or foreign professional limited liability companies authorized by law in this state to render a professional service permitted by the articles of organization of the professional limited liability company.

(2) The licensing authority may by rule further restrict or condition the issuance of membership interests in order to preserve ethical standards, but a rule may not

cause a member at the time the rule becomes effective to become a disqualified person.

NEW SECTION. **Section 76. Rendering services.** A domestic or foreign professional limited liability company may render professional services in this state only through natural persons permitted to render the services in this state; however, nothing in [sections 72 through 78] requires any person employed by a professional limited liability company to be licensed to perform services for which a license is not otherwise required or prohibits the rendering of professional services by a licensed natural person acting in that person's individual capacity, even if the person is a member or manager of a professional limited liability company.

NEW SECTION. **Section 77. Responsibility for services.** (1) An individual who renders professional services as an employee of a domestic or foreign professional limited liability company is liable for any negligent or wrongful act or omission in which the individual personally participates to the same extent as if the individual had rendered the services as a sole practitioner. An employee of a professional limited liability company is not liable for the conduct of other employees unless the employee is at fault in appointing, supervising, or cooperating with them.

(2) A domestic or foreign professional limited

liability company whose employee performs professional services within the scope of the employee's employment or apparent authority to act for the company is liable to the same extent as the employee.

(3) Except as otherwise provided by statute, the personal liability of a member of a domestic or foreign professional limited liability company is no greater in any respect than that of a member of a limited liability company otherwise organized under [sections 72 through 78].

NEW SECTION. **Section 78.** **Relationship to clients and patients.** (1) The relationship between an individual performing professional services as an employee of a domestic or foreign professional limited liability company and a client or patient is the same as if the individual performed the services as a sole practitioner.

(2) The relationship between a domestic or foreign professional limited liability company performing professional services and the client or patient is the same as between the client or patient and the individual performing the services.

(3) Any privilege applicable to communications between a person rendering professional services and the person receiving the services recognized under the statutory or common law of this state extends to a domestic or foreign professional limited liability company and its employees.

Section 79. Section 30-13-141, MCA, is amended to read:

"30-13-141. **Definitions.** As used in 30-13-141 through 30-13-147, the following definitions apply:

(1) "Owner" means the person who owns the original fixation of sounds embodied in a master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded and from which the transferred recorded sounds are directly derived.

(2) "Performer" means the person or persons appearing in a performance.

(3) "Person" means any individual, firm, partnership, limited liability company, corporation, or association.

(4) "Sound recording" means a phonograph record, disc, wire, tape, film, or other article on which sound is recorded."

Section 80. Section 30-13-202, MCA, is amended to read:

"30-13-202. **Registration of assumed business name -- when prohibited.** (1) When an application for registration or amendment to the registration of an assumed business name contains an assumed business name which is the same as or deceptively similar to an assumed business name already registered or to any corporate name, limited partnership name, limited liability company name, trademark, or service

mark registered or reserved with the secretary of state, the secretary of state may not register the assumed business name for which application is made.

(2) When the applicant is other than a corporation, or limited partnership, or limited liability company, the secretary of state may not register the assumed business name for which application is made if the name applied for contains or there is added at the end of the name the word "corporation", "company", "incorporated", or "limited" or an abbreviation of one of ~~such~~ the words."

Section 81. Section 30-13-301, MCA, is amended to read:

"**30-13-301. Definitions.** In this part, unless the context requires otherwise, the following definitions apply:

(1) "Applicant" means the person filing an application for registration of a trademark under this part or ~~his~~ the person's legal representatives, successors, or assigns.

(2) "Mark" means any trademark or service mark entitled to registration under this part whether registered or not.

(3) "Person" means any individual, firm, partnership, limited liability company, corporation, association, union, or other organization.

(4) "Registrant" means the person to whom the registration of a trademark under this part is issued or ~~his~~ the person's legal representatives, successors, or assigns.

(5) "Service mark" means a mark used in the sale or

advertising of services to identify the services of one person and distinguish them from the services of others.

(6) "Trade name" means a word, name, symbol, device, or any combination thereof used by a person to identify ~~his~~ the person's business, vocation, or occupation and distinguish it from the business, vocation, or occupation of others.

(7) "Trademark" means any word, name, symbol, device, or any combination thereof adopted and used by a person to identify goods made or sold by ~~him~~ the person and to distinguish them from goods made or sold by others."

Section 82. Section 30-13-311, MCA, is amended to read:

"**30-13-311. Application for registration.** (1) Subject to the limitations set forth in this part, a person who adopts and uses a mark in this state may file in the office of secretary of state, on a form to be furnished by the secretary of state, an application for registration of that mark setting forth information including but not limited to the following:

(a) the name and business address of the person applying for ~~such~~ registration and, if a corporation, the state of incorporation or, if a limited liability company, the state of organization;

(b) the essential feature of the mark to be registered;

(c) the goods or services in connection with which the mark is used and the mode or manner in which the mark is

used in connection with ~~such~~ the goods or services and the class in which ~~such~~ the goods or services fall;

(d) the date when the mark was first used anywhere and the date when it was first used in this state by the applicant or ~~his~~ the applicant's predecessor in business;

(e) a statement that the mark is presently in use in this state by the applicant; and

(f) a statement that the applicant is the owner of the mark and that no other person has the right to use the mark in this state either in the identical form ~~thereof~~ or in a form that so nearly resembles it that it might be calculated to deceive or might be mistaken for it.

(2) The application must be signed by the applicant or a member of the firm or limited liability company or an officer of the corporation or association applying.

(3) The application must be accompanied by two copies of a specimen or facsimile of ~~such~~ the mark.

(4) The application for registration must be accompanied by a filing fee as provided for in 30-13-320."

Section 83. Section 35-1-308, MCA, is amended to read:

"35-1-308. **Corporate name.** (1) A corporate name:

(a) must contain the word "corporation", "incorporated", "company", or "limited"; the abbreviation "corp.", "inc.", "co.", or "ltd."; or words or abbreviations of similar meaning in another language; and

(b) may not contain language that states or implies that the corporation is organized for a purpose or purposes other than those permitted by 35-1-114 and its articles of incorporation.

(2) Except as authorized by subsections (3) and (4), a corporate name must be distinguishable in the records of the secretary of state from:

(a) the corporate name of another corporation incorporated or authorized to transact business in this state;

(b) a corporate name reserved or registered under 35-1-309 or 35-1-311;

(c) the fictitious name adopted by a foreign corporation authorized to transact business in this state because its real name is unavailable;

(d) the corporate name of a not-for-profit corporation incorporated or authorized to transact business in this state;

(e) the corporate name of a domestic corporation that has dissolved, but only distinguishable for a period of 120 days after the effective date of its dissolution; and

(f) any assumed business name, limited partnership name, limited liability company name, trademark, or service mark registered or reserved with the secretary of state.

(3) A corporation may apply to the secretary of state

for authorization to use a name that is not distinguishable in the secretary of state's records from one or more of the names described in subsection (2). The secretary of state shall authorize use of the name applied for if:

(a) the other corporation consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable in the records of the secretary of state from the name of the applying corporation; or

(b) the applicant delivers to the secretary of state a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in the state.

(4) A corporation may use the name, including the fictitious name, of another domestic or foreign corporation that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the proposed user corporation:

(a) has merged with the other corporation;

(b) has been formed by reorganization of the other corporation; or

(c) has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(5) This chapter does not control the use of fictitious

names."

Section 84. Section 35-1-1031, MCA, is amended to read:

"35-1-1031. Corporate name of foreign corporation. (1) If the corporate name of a foreign corporation does not satisfy the requirements of 35-1-308, to obtain or maintain a certificate of authority to transact business in this state the foreign corporation shall:

(a) add the word "corporation", "incorporated", "company", or "limited" or the abbreviation "corp.", "inc.", "co.", or "ltd." to its corporate name for use in this state; or

(b) use a fictitious name to transact business in this state if its real name is unavailable and deliver to the secretary of state, for filing, a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

(2) Except as authorized by subsections (3) and (4), the corporate name of a foreign corporation, including a fictitious name, must be distinguishable in the records of the secretary of state from:

(a) the corporate name of a corporation incorporated or authorized to transact business in this state;

(b) a corporate name reserved or registered under 35-1-309 or 35-1-311;

(c) the fictitious name of another foreign corporation

authorized to transact business in this state;

(d) the corporate name of a not-for-profit corporation incorporated or authorized to transact business in this state;

(e) the corporate name of a domestic corporation that has dissolved, but only for a period of 120 days after the effective date of its dissolution; and

(f) any assumed business name, limited partnership name, limited liability company name, trademark, or service mark registered or reserved with the secretary of state.

(3) A foreign corporation may apply to the secretary of state for authorization to use in this state the name of another corporation, incorporated or authorized to transact business in this state, that is not distinguishable in the secretary of state's records from the name applied for. The secretary of state shall authorize use of the name applied for if:

(a) the other corporation consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable in the records of the secretary of state from the name of the applying corporation; or

(b) the applicant delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the

name applied for in this state.

(4) A foreign corporation may use in this state the name of another domestic or foreign corporation, including the fictitious name, that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the foreign corporation:

(a) has merged with the other corporation;

(b) has been formed by reorganization of the other corporation; or

(c) has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(5) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of 35-1-308, it may not transact business in this state under the changed name until it adopts a name satisfying the requirements of 35-1-308 and obtains an amended certificate of authority under 35-1-1029."

Section 85. Section 35-2-305, MCA, is amended to read:

"**35-2-305. Corporate name.** (1) A corporate name may not contain language stating or implying that the corporation is organized for a purpose other than that permitted by 35-2-117 and its articles of incorporation.

(2) Except as authorized by subsections (3) and (4), a

corporate name must be distinguishable in the records of the secretary of state from:

(a) the corporate name of a nonprofit or business corporation incorporated or authorized to do business in this state;

(b) a corporate name reserved or registered under Title 35, chapter 1, 35-2-306, or 35-2-307;

(c) the fictitious name of a foreign business or nonprofit corporation authorized to transact business in this state because its real name is unavailable;

(d) the corporate name of a domestic business or nonprofit corporation that has been dissolved, but only distinguishable for a period of 120 days after the effective date of the dissolution; or

(e) any assumed business name, limited partnership name, limited liability company name, trademark, or service mark registered or reserved with the secretary of state.

(3) A corporation may apply to the secretary of state for authorization to use a name that is not distinguishable in the secretary of state's records from one or more of the names described in subsection (2). The secretary of state shall authorize use of the name applied for if:

(a) the other corporation consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is

distinguishable in the records of the secretary of state from the name of the applying corporation; or

(b) the applicant delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(4) A corporation may use the name, including the fictitious name, of another domestic or foreign business or nonprofit corporation that is used in this state if the other corporation is incorporated or authorized to do business in this state and the proposed user corporation:

(a) has merged with the other corporation;

(b) has been formed by reorganization of the other corporation; or

(c) has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(5) This chapter does not control the use of fictitious names."

Section 86. Section 35-2-826, MCA, is amended to read:

"**35-2-826. Corporate name of foreign corporation.** (1) If the corporate name of a foreign corporation does not satisfy the requirements of 35-2-305, the foreign corporation, to obtain or maintain a certificate of authority to transact business in this state, may use a

fictitious name to transact business in this state if:

(a) its real name is unavailable; and

(b) it delivers to the secretary of state, for filing, a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

(2) Except as authorized by subsections (3) and (4), the corporate name, including a fictitious name, of a foreign corporation must be distinguishable in the records of the secretary of state from:

(a) the corporate name of a nonprofit or business corporation incorporated or authorized to transact business in this state;

(b) a corporate name reserved or registered under 35-1-309, 35-1-311, 35-2-306, or 35-2-307;

(c) the fictitious name of another foreign business or nonprofit corporation authorized to transact business in this state;

(d) the corporate name of a domestic corporation that has dissolved, but distinguishable only for a period of 120 days after the effective date of dissolution; and

(e) any assumed business name, limited partnership name, limited liability company name, trademark, or service mark registered or reserved with the secretary of state.

(3) A foreign corporation may apply to the secretary of state for authorization to use in this state the name of

another corporation, incorporated or authorized to transact business in this state, that is not distinguishable in the records of the secretary of state from the name applied for. The secretary of state shall authorize use of the name applied for if:

(a) the other corporation consents to the use in writing and submits an undertaking in a form satisfactory to the secretary of state to change its name to a name that is distinguishable in the records of the secretary of state from the name of the applying corporation; or

(b) the applicant delivers to the secretary of state a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(4) A foreign corporation may use in this state the name, including the fictitious name, of another domestic or foreign business or nonprofit corporation that is used in this state if the other corporation is incorporated or authorized to transact business in this state and the foreign corporation:

(a) has merged with the other corporation;

(b) has been formed by reorganization of the other corporation; or

(c) has acquired all or substantially all of the assets, including the corporate name, of the other

corporation.

(5) If a foreign corporation authorized to transact business in this state changes its corporate name to one that does not satisfy the requirements of 35-2-305, it may not transact business in this state under the changed name until it adopts a name satisfying the requirements of 35-2-305 and obtains an amended certificate of authority under 35-2-823."

Section 87. Section 35-4-206, MCA, is amended to read:

"35-4-206. Corporate name. The name of a domestic or foreign professional corporation:

(1) must contain the words "professional corporation" or the abbreviation "P.C.";

(2) may not contain any word or phrase that indicates or implies that the corporation is organized for any purpose other than the purposes contained in its articles of incorporation;

(3) may not be the same as or deceptively similar to any assumed business name, limited partnership name, limited liability company name, trademark, or service mark registered or reserved with the secretary of state or to the name of any domestic corporation existing under the laws of this state, any foreign corporation authorized to transact business in this state, a name the exclusive right to which is reserved in the manner provided in the Montana Business

Corporation Act, or the name of a corporation that has in effect a registration of its corporate name as provided in the Montana Business Corporation Act. This subsection does not apply if:

(a) the similarity results from the use in the corporate name of personal names of shareholders or former shareholders or of natural persons who were associated with a predecessor entity; or

(b) the corporation files with the secretary of state either the written consent of such other corporation or holder of a reserved or registered name to use the same or a deceptively similar name and one or more words are added to make such name distinguishable from such other name or a certified copy of a final decree of a court of competent jurisdiction establishing the prior right of the corporation to the use of the name in this state; and

(4) must conform to rules promulgated by a licensing authority having jurisdiction of a professional service described in the articles of incorporation of the corporation."

Section 88. Section 35-12-505, MCA, is amended to read:

"35-12-505. Name. The name of each limited partnership as set forth in its certificate of limited partnership:

(1) shall contain the words "limited partnership" in full;

(2) may not contain the name of a limited partner unless:

(a) it is also the name of a general partner; or

(b) the business of the limited partnership had been carried on under that name before the admission of that limited partner;

(3) may not contain any word or phrase indicating or implying that it is organized other than for a purpose stated in its certificate of limited partnership; and

(4) may not be the same as or deceptively similar to the name of any corporation, ~~or~~ limited partnership, or limited liability company organized under the laws of this state or licensed or registered as a foreign corporation or limited partnership in this state."

NEW SECTION. **Section 89.** Codification instruction. [Sections 1 through 78] are intended to be codified as an integral part of Title 35, and the provisions of Title 35 apply to [sections 1 through 78].

-End-

STATE OF MONTANA - FISCAL NOTE
Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB0146, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION: Creates the Montana Limited Liability Company Act.

ASSUMPTIONS:

1. An additional 2.50 FTE will be necessary in FY94 (1.00 FTE Grade 10 and 1.50 FTE Grade 7) based upon the estimated increased number of document filings. It is assumed that the peak increase will occur in FY94 and that the additional staff will be reduced to 1.50 FTE in FY95 (1.00 Grade 10 and 0.50 Grade 7).
2. $61,300 for computer system changes necessary to implement the legislation is estimated for FY94. This amount is based upon estimates provided by the Department of Administration, Information Services Division.
3. 5% of currently filed corporations will dissolve and reorganize as Limited Liability Companies (LLCs) in FY 94 (30,000 x 5% = 1500). The corporation dissolution fee is $15, the license fee for LLCs is $50 under the proposed bill, and the registration fee for LLCs is assumed to be $20.
4. 2% of currently filed corporations will dissolve and reorganize as LLCs in FY 95 (30,000 x 2% = 600).

FISCAL IMPACT:

Secretary of State's Office-Business and Goverment Services program:

Expenditures:	FY '94			FY '95		
	Current Law	Proposed Law	Difference	Current Law	Proposed Law	Difference
FTE	21.25	23.75	2.50	21.25	22.75	1.50
Personal Services	552,725	607,007	54,282	554,103	585,720	31,617
Operating Expenses	366,117	431,117	65,000	419,394	423,394	4,000
Equipment	13,770	13,770	0	7,057	7,057	0
Total	932,612	1,051,894	119,282	980,554	1,016,171	35,617
Funding:						
General Fund	932,612	1,051,894	119,282	980,554	1,016,171	35,617
Revenues:						
Corporate Dissolutions (General Fund)			22,500			9,000
LLC License/registrations (General Fund)			105,000			42,000
Total			127,500			51,000
Net general fund impact			8,218			15,383

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION: As the availability of LLCs in Montana becomes known, there is potential for the workload within the Secretary of State's Office to increase. This long-term impact is not included in the revenue estimates for the 1995 biennium.

Dave Lewis 2-1-93
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Mignon Waterman 2/2/93
MIGNON WATERMAN, PRIMARY SPONSOR DATE
Fiscal Note for SB0146, as introduced

SB 146

Section 5. **Applicability.** [Sections 1 through 3] apply to injuries and deaths that occur on or after [the effective date of this act].

Section 6. **Effective date.** [This act] is effective on passage and approval.

Approved March 18, 1993.

CHAPTER NO. 120

[SB 146]

AN ACT CREATING THE MONTANA LIMITED LIABILITY COMPANY ACT; AND AMENDING SECTIONS 30-13-141, 30-13-202, 30-13-301, 30-13-311, 35-1-308, 35-1-1031, 35-2-305, 35-2-826, 35-4-206, AND 35-12-505, MCA.

STATEMENT OF INTENT

A statement of intent is required for this bill because the secretary of state is authorized to adopt rules prescribing forms and establishing fees. The legislature intends that fees be commensurate with the cost of the services provided. It is further the intent of the legislature that the secretary of state make the forms consistent with existing forms used for corporate and other business entities, when practical and applicable, and that the new forms be as easy to use as possible.

Be it enacted by the Legislature of the State of Montana:

Section 1. **Short title.** [Sections 1 through 78] may be cited as the "Montana Limited Liability Company Act".

Section 2. **Definitions.** As used in [sections 1 through 78], unless the context requires otherwise, the following definitions apply:

(1) "Articles of organization" means articles filed pursuant to [section 8] and those articles as amended or restated.

(2) "Corporation" means a corporation formed under the laws of this state or a foreign corporation.

(3) "Court" includes every court having jurisdiction in the case.

(4) "Disqualified person" means any person or entity that for any reason is or becomes ineligible under [sections 1 through 78] to become a member in a professional limited liability company.

(5) "Event of dissociation" means an event that causes a person to cease to be a member, as provided in [section 45].

(6) "Foreign corporation" means a corporation that is organized under the laws of a state other than Montana or under the laws of any foreign country.

(7) "Foreign limited liability company" means an entity that is:

(a) an unincorporated association;

because of the choices of the death penalty. Presently a death penalty case is on appeal before the Montana Supreme Court concerning hanging as a method of execution. Part of the argument is that forcing the defendant to make a choice between hanging and lethal injection is cruel and unusual punishment. With the passage of SB 93, issues will still be litigated.

Senator Towe asked Ms. Baker about the prisoners on death row in Montana. David Dawson is in state collateral proceedings with the District Court. William Gull and Douglas Turner are on direct appeal to the Montana Supreme Court. Lester Kills On Top and Vern Kills On Top are pending in State District Court on collateral proceedings. Terry Langford is in Federal District Court on a habeas petition. Ronald Allen Smith has a state appeal pending in federal court. Duncan McKenzie is appealing in the Ninth Circuit.

Closing by Sponsor:
Senator Beck said SB 93 eliminates hanging as a form of execution to eliminate choice of an inmate. Senator Beck is asking the Committee to take the choice of execution away from the inmates. Senator Beck closed by telling the Committee that Montana finished trials of inmates who were involved in a riot at Deer Lodge State Prison. The inmates were not sentenced to death because if they had a right to choose a form of execution, the inmates would end up in the appeals court for years. The inmates should have been punished by death.

HEARING ON SB 146

Opening Statement by Sponsor:
Senator Waterman, District 22, said that SB 146 creates an exciting and innovating business entity in the state. SB 146 permits Montana business to organize and operate by using the best features of corporation and partnership law. SB 146 will enhance Montanas ability to attract and promote businesses throughout the state. SB 146 provides limited liability that corporations enjoy, while allowing the tax benefits of a partnership. SB 146 is well suited for Montana's small and family businesses.

Proponents' Testimony:
Steven Bahls read from prepared testimony. (Exhibit #3)
Professor Bahls submitted information on the Limited Liability Company Act. (Exhibit #4, Exhibit #5, Exhibit #6)

Garth Jacobson read from prepared testimony. (Exhibit #7)

Julie McGarry said that limited liability company legislation is being enacted all over the county. If Montana wants to attract investments and new businesses to the state, it has to be aware

of what other states are doing in order to remain competitive. (Exhibit #8) Ms. McGarry supports SB 146.

Richard Baskett, attorney, said that SB 146 addresses the competitiveness between the states. There is flexibility in a limited liability company, when compared to other kinds of business organizations. General partnerships are subject to complete liability for the partners. An option that is now available in Montana is the use of a limited partnership. There has to be a general partner in a limited partnership. A limited liability company would not have a general partner. Limited partners are not allowed to have any say in management, only the general partner can be involved with the management of a limited partnership. The limited partner who actively participates would be liable for violating rules, the same as if it were a general partner. SB 146 would avoid those traps. In a limited partnership, it is possible to become liable as a general partner, if the limited partner becomes to involved in management. With limited liability company the potential of becoming liable would be avoided. SB 146 simplifies the organization of businesses in Montana.

David Owen, Montana Chamber of Commerce, stated that SB 146 is a concept that is advantageous for small and family businesses, and professional service organizations. Montana is a small business state, for that reason limited liability would be an advantage for businesses in Montana. Mr. Owen urges support.

Tom Morrison, tax lawyer, stated that Limited Liability Companies will help small businesses in Montana. SB 146 is not a solution or a substitute for large corporations. Large corporations would not use the limited liability company because of the way it was put together. SB 146 would place Montana with the rest of the progressive states that feel Limited Liability Companies are helpful to small businesses.

Bill Stevens read from prepared testimony. (Exhibit #9)

Riley Johnson, National Federation of Business in Montana, urges support of SB 146.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Halligan asked Professor Bahls how the limited liability companies would effect the Uniform Partnership Act. Professor Bahls said that unlike partnerships, the Limited Liability Companies may only be formed by filing with the Secretary of the State. Montana will need a partnership law for those small businesses that are involved in a partnership. Partnerships would not be used as much in Montana if SB 146 passes.

Chair Yellowtail asked Professor Bahls whether there is incongruity between the partnership acts and SB 146. Professor Bahls stated that SB 146 would work with the existing partnership act and would not be inconsistent with the new uniform partnership act should it pass.

Senator Doherty asked Professor Bahls about the tax revenue. Professor Bahls said that there will be no significant revenue loss to Montana. SB 146 would be used primarily by individuals who are operating as partnerships now, and then would take advantage of limited liability which would not create a change in tax.

Senator Doherty asked Professor Bahls about malpractice under SB 146. Professor Bahls said that section 77 makes it clear that the law firm itself would be liable in a Limited Liability company. The additional people liable would be the attorneys that committed the malpractice or the associates. Section 77 is identical to the sections of the professional corporation act. Montana has the most restricted provisions in the nation with respect to Professional Limited Liability Companies. SB 146 would not give professionals any more protection than they have now under the Professional Corporation Statute.

Senator Doherty asked Professor Bahls if SB 146 would be less protective if that legal entity was a partnership. Professor Bahls said that is correct.

Senator Doherty asked Professor Bahls about debts with a limited liability corporation. Professor Bahls said that with a Limited Liability Company Act, it would be as if dealing with a corporation. If partners decide to incorporate at a point in time, it would be the corporation which is liable and not the individuals.

Senator Doherty asked Professor Bahls about piercing the limited liability corporate veil. Professor Bahls stated that the theory of piercing the corporate veil is not found in the Montana Code Annotated. Professor Bahls feels that piercing the corporate veil ought to apply to limited liability. Professor Bahls gave an example. If a limited liability company commits a fraud on the public, the courts ought to be able to pierce the veil. Professor Bahls gave an example. "If a limited liability company ran a blasting business in a city area and capitalizes the business with one dollar, the courts could pierce the corporate veil. Limited Liability Companies veil should not be pierced merely for failure to observe corporate type formalities.
Senator Doherty asked Professor Bahls about proof problems concerning limited liability corporations that attempt to show that an individual should be liable because the corporation was formed to avoid liability. Professor Bahls said that there would be proof problems, the same problems that a plaintiff faces in trying to pierce a corporate veil in Montana. The presumption of piercing the corporate veil can be overcome, but is difficult to

do.

Senator Doherty asked Professor Bahls about forms for SB 146. Professor Bahls said that there are forms that exist for SB 146.

Senator Towe asked Professor Bahls about the liability of a tort that is committed by a member of a limited company. The president of a corporation is liable for negligence committed even though that president was a shareholder.

Senator Towe asked Professor Bahls whether under SB 146 one would obtain the benefits of limited liability for limited partners or shareholders. Professor Bahls said that is correct.

Senator Towe asked Mr. Morrison about the passive loss rules. Mr. Morrison said that the passive loss rules would apply as it would in a partnership.

Senator Towe asked Mr. Morrison whether a partner would be stuck with the passive loss rules if the partner did not take an active role in the operation. Mr. Morrison said that the partner would not.

Senator Towe asked Professor Bahls if SB 146 would allow shares to be divided so the partners could own a certain number of shares. Professor Bahls said that special provisions would need to be included in the articles of organization or the operating agreement to enable SB 146 to do that. SB 146 was drafted for small businesses with the recognition that additional provisions in the articles of organization could accommodate the larger businesses so shares could be issued.

Senator Towe asked Professor Bahls about a dissolution of a partnership. Professor Bahls said that the law provides that there will be a dissolution of the partnership when a partner dies, unless the remaining partners unanimously agree to bind the shares. If the partners bind the shares there will be a disassociation, not a dissolution, similar to the new partnership act.

Senator Towe asked Professor Bahls about page 10. Professor Bahls said that an insurance company or bank cannot organize as a limited liability corporation because they are separately regulated.

Senator Crippen asked Mr. Morrison about selling an interest in a partnership. Mr. Morrison said that at a partnership level, when one partner sells interest, nothing would happen unless the partners elect to take a special basis election.

Senator Crippen asked Mr. Morrison what the partner is selling when the interest is sold under the present law. Mr. Morrison said a partner would be selling an intangible contract right.

Senator Crippen asked Professor Bahls about the treatment of income. Professor Bahls said that there are special provisions in the internal revenue code that say accounts receivable of a partnership is treated as ordinary income. Anything left over after the value of the sale is capital gain.

Professor Bahls stated that the present federal tax law controls the treatment of income regarding partnerships. SB 146 was drafted so partners who comply with the general rules will qualify as partnerships for tax purposes. Flexibility has been added to SB 146 to allow enough changes so partnerships could be treated as a corporation for federal tax purposes. The Internal Revenue Service looks at characteristics to determine whether a partnership will be treated as a partnership or a corporation. SB 146 allows a partnership to provide free transfers of ownership or not to, or to provide centralized management or not to. Changing characteristics changes the ultimate tax result of the Limited Liability Company.

Senator Towe asked Professor Bahls whether a partnership would flunk a partnership test in a shared system, if it makes sure that the shares could be easily transferred from one person to another. Professor Bahls said the partnership would flunk the continuity of life, free transferability, limited liability, and centralized management. If the partnership gets involved with centralized management combined with free transferability of interest, as permitted to do under this statute, the partnership would lose the tax benefits.

Senator Halligan asked Professor Bahls about tort liability. Professor Bahls said entity assets would be available for creditors involved in a tort, but personal assets of owners not participating in the tort would not be available.

Closing by Sponsor:
Senator Waterman said that it is obvious that the creation of a Limited Liability Company in Montana will have a positive impact on the state, directly and indirectly. SB 146 is a useful alternative to small businesses in Montana. If Montana is to be competitive with other states it needs to be flexible, and SB 146 allows Montana that opportunity.

ROLL CALL

SENATE COMMITTEE Judiciary DATE 1-21-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen	X		X
Senator Grosfield	X		
Senator Halligan	X		
Senator Harp	X		
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock			X
Senator Rye	X		X

FC8

Attach to each day's minutes

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 1-21-93
BILL NO. SB146

Testimony of
Steven C. Bahls
in support of
SB 146
(Montana Limited Liability Company Act)

My name is Steven C. Bahls. I am the Associate Dean and a Professor at the University of Montana School of Law. I teach Business Organizations I and II, as well as agricultural law. I have had the pleasure of serving as Chair of the Limited Liability Company Subcommittee of the Tax, Probate and Business Section of the State Bar of Montana. It is this subcommittee that drafted SB 146.

Limited liability companies are a relatively new form of business organization in the United States. Limited liability companies originated in Germany in 1892 and are now extensively used in Europe and Latin America. Authorized by legislatures in approximately one third of the states, limited liability companies are a hybrid business entity created by combining the best of both worlds from corporations and partnerships. Limited liability company owners, like corporate shareholders, are not personally responsible for the debts of the business. Section 23. Owners of limited liability companies, however, receive the tax benefits of taxation as partners. Revenue Ruling 88-76. These tax benefits include taxation of the income of a LLC to the owners and not to the LLC. (Corporations, by contrast, are generally subject to double taxation at both the corporate level and at the shareholder level.) Owners of limited liability companies receive the ability to offset any losses incurred in the business against other personal income. Authorizing limited liability companies in Montana will allow Montana business a form of business organization providing the same advantages as Wyoming and several other states in our region provide.

The LLC is an evolutionary entity that provides significant advantages in today's business world. LLCs promise simplicity in formation, flexibility in planning and operation, limited liability, member control of the business and pass through tax advantages without a lot of burdensome restrictions. Given the flexibility and tax advantage of LLCs, LLCs are appropriate for entrepreneurial ventures with a small number of owners. LLCs are especially well suited for family businesses. Finally, LLCs may, in many cases, be appropriate for corporate joint ventures, real estate,

farm and ranch businesses, mining and oil and gas investments, high technology businesses and professional businesses.

HISTORY OF LLCs

In 1986, federal tax legislation repealed many of the tax advantages given corporations, thereby reinforcing the double taxation of corporations and shareholders. Likewise, the inversion of the corporation and individual tax rates further compounded problems for businesses taxed as corporations. As a result, business had a greater incentive to organize as partnerships. Many businesses were hesitant to organize as partnerships, however, because owners of partnerships (unlike shareholders) are jointly liable for all partnership debts. The state of Wyoming had enacted legislation creating limited liability companies. Wyoming's legislation was modelled after the German model. Wyoming touted its limited liability company legislation as offering both partnership tax attributes and corporate limited liability. In 1988, the IRS released Revenue Ruling 88-76, which stated properly that structured Wyoming LLCs would be taxed as partnerships, even though its owners had limited liability. This IRS ruling settled many doubts about the future of LLCs and broke the way for further states to begin legislation in this area.

In 1991, driven by changes in tax laws and acting (specifically in reaction to the 1988 Revenue Ruling), the American Bar Association (ABA) released a first draft of the Prototype Limited Liability Company Act. This prototype Act provides the solid foundation for states, such as Montana, to create LLC legislation.

In 1991, the Tax, Probate and Business Section of the Montana State Bar created a Limited Liability Company Subcommittee to study the progress of LLCs on the national level and to propose appropriate LLC legislation for Montana. The objective of the Subcommittee was to provide Montana businesses with the same benefits other states authorizing LLCs provide. The Subcommittee is comprised of a bipartisan, diverse body of attorneys, and includes private practitioners, members of state government and academia, as well as a law student associate member who has reviewed LLC laws of other jurisdictions.

After much research, discussion and several all day meetings, the Subcommittee members unanimously agreed to go forward with proposing LLC legislation for Montana. The members of the Subcommittee unanimously believed that it is in the interest of Montana businesses to adopt legislation as soon as possible. The Subcommittee's proposal was recently endorsed by the State Bar of Montana. Governor Racicot has also stated his support for LLC legislation.

The Montana Subcommittee's proposal is based largely on the version of the Prototype Limited Liability Company Act prepared by the American Bar Association in July of 1992. The ABA Section of Business Law that drafted the LLC Prototype has had a history of drafting successful, comprehensive legislation. This ABA Section is led by many of the nation's foremost legal experts on business organizations. Through the appropriate subcommittee this Section has drafted both the Model Business Corporation Act (adopted by 30 states), the Statutory Close Corporation Act, and the Model Nonprofit Corporation Act, all of which have been adopted in large part by the state of Montana. The ABA Model Acts have dominated state corporate governance statutes. Senate Bill 146 is based on the ABA Prototype, but has been revised by the Montana Bar Committee to better meet the needs of Montana businesses. Revisions include standardized filing provisions with the secretary of state, (sections 12-18) as well as revisions limiting the ability of professionals to escape from liability for malpractice. Section 77.

At this point, I would like the Committee to receive a copy of the ABA Prototype Limited Liability Company Act (with Official Commentary) and the Montana Comments to the Montana Limited Liability Company Act. These materials, if the bill is enacted, will provide valuable guidance in its interpretation.

DESCRIPTION OF LLC

As I previously indicated, the Montana Limited Liability Company Act borrows provisions from both the corporate and partnership law. It borrows these corporate characteristics.

- Owners of limited liability companies, like corporate shareholders, are generally not liable for the debts of the limited liability company. Section 23. Exceptions include when owners guarantee debts of a LLC or when owners personally commit wrongs while acting for an

LLC. See Official ABA Commentary and Montana Comments. Section 23. For both of these exceptions, owners will be personally liable for the debts or damages.

- Because limited liability companies are a separate legal entity, limited liability companies must file organizational papers with the secretary of state. Section 9. Limited liability companies must maintain a registered agent and register office in this state. Section 5. Like corporations, limited liability companies must file annual reports with the secretary of state. Section 15. The bill directs the secretary of state to recoup the costs of processing documents by assessing filing fees. Section 18(3).
- When limited liability companies dissolve, like corporations, its owners hold the assets of the limited liability company in trust for creditors. Section 54.

Limited liability companies also possess several important partnership attributes. Many of the partnership attributes of the limited liability company must be included in the legislation in order that limited liability companies are taxed as partnerships.

- Limited liability companies, like partnerships, do not have continuity of life. As such, if an owner of a limited liability company dies, resigns, or files bankruptcy (and the members interest is not purchased by the limited liability company within 90 days), the limited liability company is dissolved. Sections 45 and 46.
- Limited liability companies are generally not managed by managers or by a board of directors, but are instead member managed. Section 24. Unless the organizational documents provide otherwise, each member has one vote. Section 26.
- An interest in limited liability companies, unlike corporate stock, is not freely transferable. As with a partnership interest, an owner of a limited liability company that seeks to transfer his or her interest, transfers only an interest in any distributions from the limited liability company. Section 41. The transferee does not gain the right to manage or vote.
- Limited liability companies are flexible like partnerships. Unlike corporations, there are no rigid requirements for meetings or for a

board of directors. Instead, the operation of a limited liability company is governed by an operating agreement, to be entered into among its owners. Section 2(16).

ILLUSTRATION OF WHY LLCs ARE ATTRACTIVE

To illustrate the advantages of a LLC, consider family members who want to operate a small business together. Right now the main choices are operating as a partnership or as a corporation. Both of these familiar business entities offer serious drawbacks along with their benefits. Simplicity is a partnership's main appeal: It's easy to set up and requires no bylaws, board of directors or annual meeting. A partnership is not subject to taxation. All income is divided among the partners, who pay taxes on their share profits at individual rates, which are often lower than corporate rates. Partnership losses can be used to offset a partner's other income.

The downside of partnerships is that each partner is fully liable for the debts of the partnership. If you and your brother-in-law were partners on a farm where a visitor got badly hurt, both of you would be equally responsible for the damages caused by the injury even if the injury was the result of just one partner's negligence.

Fear of such liability has prompted hundreds of small businesses to incorporate. The protection they receive is substantial: Shareholders of a properly structured family corporation are no more responsible for the corporation's debts than General Motors shareholders are for court judgements that may be brought against GM.

But the corporation has to be run properly to maintain that legal shield. The law requires that shareholders elect a board of directors and officers. The corporation also has to hold a business meeting at least once a year and obey the required corporate formalities. Miss a requirement and a court may decide the business is not really a corporation and that the owners should be held personally responsible for its debts.

Worse yet, a corporation's income is subject to double taxation. First the corporation pays taxes on its earnings; then it pays what's left to the shareholders as dividends and the shareholders pay taxes on it as individuals.

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It is true that a small business such as a family farm can declare itself an "S corporation," and avoid the corporate tax. An S corporation is taxed like a partnership. But that choice comes with restrictions - no corporate owners, no foreign owners, no more than 35 shareholders and fewer business related tax advantages than partnerships are allowed.

Most significantly for small business owners, an S corporation cannot have more than one class of owners. This precludes a popular estate planning option in which the family-owned corporation issues preferred stock to the parents and common stock to the children, in hope of providing the children with a greater share of the business' income over time.

The shortcomings of operations and partnerships and corporation explain the appeal of the limited liability company. It offers most of the simplicity, flexibility and tax advantages of a partnership, and the same protection from liability as a corporation.

RESPONSIBLE OPERATION OF BUSINESS

The Montana Limited Liability Company Act has been drafted to encourage responsible operation of business. Professionals, such as attorneys, accountants and doctors may operate as professionally limited liability companies; but these professionals, by law, would remain liable for their own malpractice and the malpractice of those they supervise. Section 77. The provision governing professional LLC are based on the provision restricting the operation of Montana corporations. Similarly, the legislation does not change the rule that business persons who commit torts are liable for their torts. See Montana Comments.

For example, assume a construction company has become a limited liability company. Assume that the LLC was negligent in its design and erection of a building. The LLC, itself, and those who participated in the design or construction are responsible for the negligence. But just as corporate shareholders or officers who don't participate in the design or construction are not responsible, similarly situated members of a LLC are not responsible. *See, e.g., Little v. Grizzly Manufacturing,* 636 P. 2d 839 (Mont. 1980).

CONCLUSION

It is imperative to note that of the approximately one third of the states with LLC legislation in effect, four of the states are in the Rocky Mountain region of the United States: Wyoming (1977), Colorado (1991), Nevada (1991), and Utah (1991). Wyoming advertises that its LLC statute provides a tremendous benefit to those doing business in Wyoming. Montana business deserves the same opportunity and advantage afforded to business in neighboring states. To remain competitive, Montana should provide this opportunity immediately. Not only will LLCs provide an exciting alternative to more conventional forms of business organizations in our state, but legislation will facilitate a welcome improvement in Montana's business image. LLCs are pro-economic development, at virtually no cost. And as Montana strives to be a leader not a follower in providing for small business, it makes great sense that Montana seize this opportunity now.

National statistics show that the most growth in the business arena in the last decade has been in the area of small business. I suspect this is particularly true of business in Montana. Responsible legislation that will help small business in Montana is urgently needed. If Montana wishes to compete for small business with surrounding states, LLC legislation is a practical necessity and a step toward the future.

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Ag Law

By STEVEN BAHLS and JANE EASTER BAHLS

A promising solution to the business-structure riddle

Should you operate the family farm as a partnership or as a corporation? Your best answer may be "neither." At least 16 state legislatures have enacted laws that permit a new type of business structure called the limited liability company. Most other states are considering such legislation.

The LLC, meant to combine the best of the corporation and the partnership, is a needed alternative. Both of the familiar choices offer serious drawbacks along with their benefits. Simplicity is a partnership's main appeal: It's easy to set up and requires no bylaws, board of directors or annual meeting. And a partnership is not subject to taxation. All income is divided among the partners, who pay taxes on their share at individual rates, which are often lower than corporate rates.

The downside is that each partner is fully liable for the debts of the partnership. That's a sobering thought. If you and your brother-in-law were partners on a farm where an employee or visitor got badly hurt, both of you would be equally responsible for the legal bills even if the injury was the result of just one partner's negligence.

Fear of such liability has prompted hundreds of family farmers to incorporate. The protection they receive is substantial: Shareholders of a properly structured farm corporation are no more responsible for the corporation's debts than General Motors shareholders are for court judgments that may be brought against GM.

But the corporation has to be run properly to maintain that legal shield. The law requires that shareholders elect a board of directors and officers. The corporation also has to hold a business meeting at least once a year and file an annual report with the state. Miss a requirement and a court may decide the business is not really a corporation and that the owners should be held personally responsible for its debts.

Worse, a corporation's income is subject to double taxation. First the corporation pays taxes on its earnings, then it pays what's left to the shareholders as dividends and the shareholders pay taxes on it as individuals.

True, a small business such as a family farm can declare itself an "S corporation," and avoid the corporate tax: an S corporation is taxed like a partnership. But that choice comes with restrictions — no subsidiaries, no more than 35 shareholders (none of whom may be a partnership, a trust or another corporation) and fewer business-loss write-offs than partnerships are allowed.

Limited liability companies include many of the best features of partnerships and corporations.

Most significantly for farmers, an S corporation cannot have more than one class of owners. That precludes a popular retirement plan in which the corporation issues preferred stock to the parents and common stock to the children, in hope of providing the children with a greater share of the farm's income over time.

The shortcomings of the available forms explain the appeal of the LLC: It offers most of the simplicity, flexibility and tax advantages of a partnership, and the same protection from liability as a corporation.

Limited liability companies as a form of business organization began to attract attention after the Tax Reform Act of 1986 made corporate structures less attractive by increasing the corporate tax rate and eliminating some of the exceptions to corporate double taxation. LLCs really caught on after the IRS ruled in 1988 that LLCs authorized by an obscure Wyoming statute could provide shareholders with both a corporation's liability shield and a partnership's tax benefits.

Roger Wentworth

Other states decided to follow Wyoming's example. States that currently have rules governing LLCs include Illinois, Minnesota, Kansas and Texas.

Iowa allows LLCs but forbids them from owning or leasing farmland. Designed to prevent big LLCs from taking over farmland, the statute fails to provide an exception for family farms.

In general, the rules make creating an LLC quite trouble-free. Two or more persons may set one up merely by filing a simple document with the state and paying a modest fee. The members of the LLC then sign an agreement that governs how the business is managed, how membership interests are transferred and how profits are shared.

LLCs are most appropriate for new farm businesses and existing partnerships that want to convert; corporations that turn into LLCs are likely to be taxed on the conversion. Of course, to make sure an LLC is right for you and to set it up correctly, consult your attorney for guidance.

Steven Bahls is a law professor at the University of Montana in Missoula. Jane Easter Bahls is a FARM FUTURES contributing editor

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OFFICE OF THE GOVERNOR

STATE OF MONTANA

MARC RACICOT
GOVERNOR

STATE CAPITOL
HELENA, MONTANA 59620-0801

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SB 146

January 11, 1993

Steven Bahls
Associate Dean and Professor
University of Montana
School of Law
Missoula MT 59812-1071

Dear Steven:

I will support the legislation proposed by the State Bar of Montana authorizing a new type of business entity called Montana Limited Liability Companies.

The Internal Revenue Services' approval of Limited Liability Companies certainly requires that Montana adopt this type of business entity in order to remain competitive with surrounding states.

Since the Department of Revenue does not anticipate a significant loss of revenue and since the public is properly protected, there would not appear to be any major opposition to legislation of this nature.

Best of luck as you shepherd the bill through the legislative process.

Happy holidays.

Sincerely,

Marc Racicot

MARC RACICOT
Governor

TELEPHONE: (406) 444-3111 FAX: (406) 444-5529

EXHIBIT 4
DATE 1-21-93
SB 146

COMMENTS TO THE MONTANA LIMITED LIABILITY COMPANY ACT

INTRODUCTORY COMMENTS

These Comments are intended to assist with interpreting the Montana Limited Liability Act. These Comments were drafted by Professor Steven C. Bahls and Attorney Julie McGarry and adopted by the Limited Liability Company Subcommittee of the State Bar of Montana's Tax, Probate and Business Section.

All sections of the Montana Limited Liability Company Act, unless otherwise specified, are based on the Prototype Limited Liability Company Act (July 16, 1992) drafted by the American Bar Association's Subcommittee on Limited Liability Companies of the Partnerships and Unincorporated Business Organizations Committee. The Montana Limited Liability Company Subcommittee believes that the Commentary to the ABA Prototype will be of substantial help in interpreting the Montana Limited Liability Company Act.

GENERAL COMMENTS

As a general rule, a Montana LLC should be considered as a separate entity. The drafters agree with Introductory Comment Eight accompanying the ABA Prototype Act:

> "The Committee has concluded that an LLC should be generally considered a separate entity for all purposes rather than merely an aggregate of individual members. Although this decision was made, the term entity was not included in the definition of limited liability company. Thus, for example, the Prototype makes clear that the entity itself owns property and engaged in litigation. This should prevent the confusion resulting in partnerships from the fact that the Uniform Partnership Act does not explicitly characterize the partnership, and contains both aggregate features, such as technical dissolution on dissociation of a member, and entity features, such as the partnership's power to take title to property."

This exhibit is 27 pages long. The original is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

EXECUTIVE SUMMARY

January 1993

QUESTIONS AND ANSWERS ABOUT LIMITED LIABILITY COMPANIES

QUESTION ONE — WHAT IS A LIMITED LIABILITY COMPANY?

ANSWER

The limited liability company (LLC) is a hybrid business entity created by combining the best of both worlds from a corporation and a partnership. It uniquely integrates the limited liability attribute of a corporation with the "pass-through" tax advantages enjoyed by a partnership.

The LLC is an evolutionary entity that provides significant advantages in today's business world. LLCs promise simplicity in formation, flexibility in planning and operation, limited liability, member control of the business, and pass through tax advantages without a lot of burdensome restrictions.

Professor Larry E. Ribstein, of George Mason University School of Law, observes the importance of limited liability companies.

> "Many lawyers and legislators have become interested in a new limited liability business form, the LLC, that lets firms adopt limited liability without many of the tax and other costs that once attended limited liability. [Over time] the partnership form of business will greatly diminish in importance. After a transitional period, partnership will survive, if at all, as a residual form for firms that have no customized agreement." Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U.L.Q. 417 (1992).

EXHIBIT SUMMARY
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Given the flexibility and tax advantage of LLCs, LLCs are appropriate for entrepreneurial ventures with a small number of owners. LLCs are especially well suited for family businesses. Finally, LLCs may, in many cases, be appropriate for corporate joint ventures, real estate, farms and ranches, mining and oil and gas investments, high technology businesses and professional business.

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participation in management.

(d) Consider Statutory Close Corporations.

While a statutory close corporation may operate with much of the flexibility of a LLC, the Internal Revenue Service has taken the position that statutory close corporations will not be treated as a partnership for tax purposes. The IRS states whenever an organization is incorporated, it cannot be considered a partnership. As such, a statutory close corporation cannot enjoy the tax advantages of a partnership.

(e) Consider Business Trusts.

Though authorized by the Montana Code Annotated, business trusts are rarely used. The tax law governing business trusts is uncertain and the enabling statute is outdated. Further, the limited liability aspects of business trusts are not clear when business trusts from one state seek to do business in other states. *See* Larry E. Ribstein, *supra* at 423-24.

(f) Comparison Conclusion.

For savvy business owners who have elected in the recent past to avoid double taxation through the use of an S corporation election, or have pursued limited liability through the limited partnership, the LLC promises to be an enticing alternative: it provides tax advantages without the restrictive S corporation requirements and promises limited liability to all members, even those who control and manage.

QUESTION THREE — **WHY THE LIMITED LIABILITY COMPANY NOW?**

ANSWER — In 1986, federal tax legislation repealed the General Utilities doctrine and Congress reinforced the double taxation of corporations and shareholders. Likewise, the inversion of the corporation and individual tax rates further compounded problems for businesses taxed as corporations. Before 1986, two states (Wyoming and Florida) had limited liability legislation in effect and much doubt existed as to whether LLCs would receive the benefit of taxation as a partnership.

In 1988, the IRS released Revenue Ruling 88-76, which stated properly that structured Wyoming LLCs would be taxed as partnerships. This

IRS ruling settled many doubts about the future of LLCs and broke the way for further states to begin legislation in this area.

In 1991, driven by changes in the tax laws and acting specifically in reaction to the 1988 Revenue Ruling, the American Bar Association (ABA) released a draft of the Prototype Limited Liability Company Act. In July of 1992, it released a new version of the Prototype Act. The 1992 prototype Act provides the solid foundation for states, such as Montana, to create LLC legislation.

Given the current status of the tax laws, there is no better time than now for limited liability companies. The time is ripe. Currently sixteen states have enacted LLC legislation. At least twenty other states, including Montana, have formed study groups to investigate the desirability of LLC legislation. Those proposing this Act in Montana believe that Montana needs LLC legislation in 1993.

QUESTION FOUR **WHY CREATE LLC LEGISLATION IN MONTANA?**

ANSWER It is imperative to note that of the seventeen states with LLC legislation in effect as of September 1992, four of the states are in the Rocky Mountain region of the United States: Wyoming (1977), Colorado (1991), Nevada (1991), and Utah (1991).

Wyoming advertises that its LLC statute provides a tremendous benefit to those doing business in Wyoming. Montana business deserves the same opportunity and advantage afforded to business in neighboring states. To remain competitive, Montana should provide this opportunity immediately. Not only will LLCs provide an exciting alternative to more conventional forms of business organizations in our state, but legislation will facilitate a welcome improvement in Montana's business image. LLCs are pro-economic development, at virtually no cost. And as Montana strives to be a leader not a follower in the business world, it makes great sense that we seize this opportunity now.

National statistics show that the most growth in the business arena in the last decade has been in the area of small businesses. This is particularly true of business in Montana. But Montana small businesses need progressive statutes governing business organization. LLCs combine the best attributes of corporations and partnerships. LLCs, as an option, will be especially beneficial to small businesses, because LLCs avoid the complex steps involved in incorporating. The LLC is relatively easy to form. It can be done in one step by filing once with the Secretary of State. There is no need for bylaws and no elections of a board of directors. An oral operating agreement is

possible if that is what the owners want. There is great operational flexibility in a LLC. Anything that will help small business in Montana is urgently needed. If Montana wishes to compete for small business with surrounding states, LLC legislation is a practical necessity and a step toward the future.

QUESTION FIVE **WHAT IS THE HISTORY OF THE MONTANA LIMITED LIABILITY COMPANY ACT?**

ANSWER

In 1991, the Tax, Probate and Business Section of the Montana State Bar created a Limited Liability Company Subcommittee to study the progress of LLCs on the national level and to propose appropriate LLC legislation for Montana. The Subcommittee is comprised of a bipartisan, diverse body of attorneys, and includes private practitioners, members of state government and academia, as well as a law student associate member who has reviewed LLC laws of all jurisdictions. Committee members include Professor Steven C. Bahls, Chair and Reporter, Julieann McGarry, Coreporter, Richard M. Baskett, Garth B. Jacobson, Alan L. Joscelyn, and Thomas C. Morrison.

After much research and discussion, the Subcommittee members unanimously agreed to go forward with proposing LLC legislation for Montana. The members of the Subcommittee unanimously believed that it is in the interest of Montana businesses to adopt legislation as soon as possible. Its recommendations have been endorsed by the State Bar of Montana.

The Montana Subcommittee's proposal is based largely on the Prototype Limited Liability Company Act prepared by the American Bar Association in July, 1992. The ABA Section of Business Law that drafted the LLC Prototype has had a history of drafting successful, comprehensive legislation. This ABA Section is led by many of the nation's foremost experts on business organizations. Through the appropriate subcommittee this Section has drafted both the Model Business Corporation Act (adopted by 30 states), the Statutory Close Corporation Act, and the Model Nonprofit Corporation Act, all of which have been adopted in large part by the state of Montana. The ABA Model Acts have dominated state corporate governance statutes.

The ABA supplemented the Prototype LLC Act with a manual that includes in depth comment on each of the issues in the Act. The manual has been disseminated nationally to states interested in the Act. The Prototype Act's provisions are derived primarily from the Revised Uniform Limited Partnership Act (RULPA) and from enacted legislation of the eight states with Limited Liability Company (LLC) Acts in

existence as of 1991. In addition, the Prototype Act relies on provisions from the Model Business Corporation Act (MBCA).

Montana's Proposed Limited Liability Act is based primarily on the ABA Prototype Act, and incorporates its own unique provisions from Title 35 of the Montana Codes Annotated (Corporations, Partnerships, and Associations).

QUESTION SIX — HOW ARE LIMITED LIABILITY COMPANIES CLASSIFIED FOR TAX PURPOSES?

ANSWER

For a LLC to qualify for the tax status of a partnership, a 1988 IRS tax ruling requires that the LLC must lack at least two of the following four corporate characteristics:

1. Continuity of life.
2. Centralization of management.
3. Limited liability.
4. Free transferability of interests.

Because the corporate characteristic of limited liability will always exist in the LLC, the entity must relinquish two of the remaining ingredients to become eligible for partnership tax treatment. The Montana Limited Liability Company Act provides for a LLC that generally lacks continuity of life, the centralization of management and free transferability of interests. But the Montana Act is also sufficiently flexible as to allow the owners to tailor the organization to their own needs: a LLC may devise a different scheme from the Montana Act's default plan by providing for such under the operating agreement or articles of organization.

QUESTION SEVEN — WILL THE LIMITED LIABILITY COMPANY ACT ALLOW COMPANIES TO OPERATE IRRESPONSIBLY?

ANSWER

NO. Although the LLC Act offers the desirable mixture of limited liability with tax advantages, it does not allow LLCs to operate irresponsibly. The owners of an LLC receive no more protection than the protection received by corporate shareholders. Like a corporation's shareholders, each of the LLC's members have no liability to the LLC or its creditors beyond each member's initial contribution. The LLC, as a legal entity, is fully responsible for its debts and other liabilities and obligations it incurs. For example, if a LLC violates the Comprehensive Environment Response, Compensation and Liability Act (CERCLA) of 1980, the LLC will be liable as if it were a corporation.

In addition, just as corporate managers may have personal liability under CERCLA, members of the LLC who are managers may have personal liability. Likewise, if a LLC member commits a tort and violates a law, that member receives no protection, just as shareholders and managers in corporations are not protected from torts they commit. *See* Larry E. Ribstein, *supra* at 440-41.

What the Montana LLC Act does promise is that if you are a member of the LLC and another member or manager violates a law or commits a tort, you are not personally liable for the tort committed by the other member or manager. Unlike a partnership, in which partners are personally liable for the torts and violations committed by another partner, the limited liability company shields members from the debts and liabilities of the organization and other individual members or managers. MCA § 35-10-305, 306 & 307.

For example, assume a construction company has become a limited liability company. Assume that the company was negligent in its design and erection of a building. The LLC, itself, and those who participated in the design or construction are responsible for the negligence. But just as corporate shareholders or officers ~~who~~ don't participate in the design or erection are not responsible, similarly situated members of a LLC are not responsible. *See, e.g., Little v. Grizzly Manufacturing*, 636 P.2d 839 (Mont. 1980).

QUESTION EIGHT **HOW IS A LIMITED LIABILITY COMPANY FORMED AND OPERATED?**

ANSWER The Montana Act involves a simple, relatively easy formation process. To comply with the purpose requirements of the Act, the LLC must be engaged in a lawful business under Montana law. The LLC must consist of one (1) or more persons. The LLC must set forth a name in the articles of organization. The name must not be deceptively similar to the names of other corporations or limited partnerships. The name must contain either the words "limited liability company" or the abbreviation "L.L.C." or the abbreviation "L.C.". The purpose of the name provisions, when read together, is to provide notice to the public and creditors that the members are not personally liable for the liability of the LLC. The LLC must file articles of organization with the Secretary of State and pay a fee. Once filing is complete, the Secretary of State issues a "certificate of organization" and the LLC becomes a recognized legal entity.

Once formed, entities have tremendous operating flexibility. The

majority of the provisions in the Montana Act offer entities the opportunity to select the default provision of the Act or to provide an alternative operating method, by merely indicating the entity's wish to do so in the operating agreement, or the articles of organization. So business organizations really can construct a LLC that suits their individual needs.

QUESTION TEN

WHAT ARE THE HIGHLIGHTED DRAFTING ISSUES THAT THE SUBCOMMITTEE OF THE MONTANA LIMITED LIABILITY COMPANY ACT CONSIDERED?

ANSWER

The following is a list of issues in the Montana LLC Act that compelled a great deal of discussion amongst Subcommittee members. Also included is the Subcommittee's decision on each debate. The Subcommittee welcomes and encourages any comments on the provisions that were ultimately included or excluded.

(a) Should there be a **presumption of member-management** or manager-management? The Subcommittee agreed that the Montana Act should be as "bullet proof" as possible for the purpose of obtaining tax treatment as a partnership. The Subcommittee sought to ensure such tax treatment for LLCs by making the default rule provide for member-management. This would ensure that LLCs in Montana lack centralized management, which is one of the four corporate characteristics that an entity may relinquish to receive partnership tax treatment. The Montana Act allows for modification for manager-management, but the entity may risk losing partnership tax treatment.

(b) Should **interests be freely assignable**? The Montana Act permits members to transfer interests in whole or in part; however, free assignability is limited under the Montana Act. The Act requires the unanimous consent of all other members before the assignee may become a member and receive all of the attributes of the transferring member's interest in the LLC. This unanimous consent requirement constitutes sufficient restriction to cause free transferability to be lacking for tax purposes. Entities may provide otherwise.

(c) Should the LLC have **continuity of life**? Merely specifying that the life of an organization is for a term of years is not enough to eliminate the characteristic of continuity of life. So the Montana Act does more. It provides that the limited liability company is

dissolved upon the certain events such as death, resignation, expulsion, bankruptcy etc., but allows the LLC to continue by amendment to the articles of organization or by the unanimous consent of the remaining members. This unanimous agreement permits the members to continue the business, thereby avoiding a dissolution, while ensuring that the LLC in the normal case lacks the corporate tax feature of continuity of life.

(d) What should be the default provision for **voting rights**? The Subcommittee agreed that the Montana Act should be as "bullet proof" as possible for the purpose of obtaining treatment as a partnership. To avoid any claim that management was centralized in the hands of the few, the Committee adopted the "one person, one vote" plan, as opposed to members voting "in proportion to their contributions to the capital of the LLC." The Subcommittee believed that the adopted method is more appropriate for service LLCs. Again, the Montana Act provides for flexibility and an organization may provide for a different voting method.

(e) Should the LLC Act be available to **professionals** in Montana? Yes. In other states, professionals, particularly CPAs, have expressed interest in operating as a LLC.

(f) Should the **allocation of profit and loss** be based on a capital interest method, or per capita method? The Committee decided the appropriate default rule of the Montana Act should be to distribute profits and losses equally. This rule is most appropriate for service providing LLCs. Capital intensive LLCs are most likely to be able to hire an attorney to make the appropriate adjustments to capital interest methods.

(g) Must the **operating agreement** be in writing? No. Because of the informal nature of many LLCs, operating agreements, like partnership agreements, need not be in writing.

(h) Should the law permit a *one-person LLC*? The Subcommittee has debated this issue. The Subcommittee was concerned that an enabling statute authorizing one-person limited liability companies might cause the IRS to question whether LLCs lack the "association" element of partnerships. In the final analysis, however, the Committee believed that the requirement of two members in a LLC would reduce the flexibility of LLCs.

QUESTION ELEVEN — DOES MONTANA REALLY NEED ANOTHER TYPE OF BUSINESS ORGANIZATION?

ANSWER

YES. The limited liability company is unlike any business entity we have now in this country. The LLC is a legitimate business alternative rooted in traditions of Partnership Association (in the United States) and the limitadus (from other countries such as Mexico and Germany). It is an evolutionary entity that makes sense in today's business world. LLCs promise simplicity in formation, flexibility in planning and operation, limited liability, member control of the business, and pass through tax advantages without a lot of burdensome restrictions. Making the LLC available to Montana business is of practical necessity, if Montana wishes to remain competitive with business in other states. It truly is an exciting business alternative that, given the opportunity, will, at no cost, improve Montana's business image.

QUESTION TWELVE — **WHAT WILL THE MONTANA LIMITED LIABILITY COMPANY SUBCOMMITTEE DO TO HELP BUSINESSES AND THE BAR LEARN ABOUT LLCs?**

ANSWER

If LLC legislation is enacted in Montana, the Subcommittee will make the Limited Liability Company Act available in a formbook and on computer disks at an inexpensive price. The Subcommittee has already worked extensively with the Montana Secretary of State's Office to create an acceptable filing form, and upon enactment of the Act, these filing forms will be available to all interested parties. Finally, the Subcommittee members, acting individually and on behalf of the Montana Bar, will provide CLEs to educate the legal and business communities in Montana about the advantages of the LLC.

QUESTION THIRTEEN — **IS THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL) STUDYING LIMITED LIABILITY COMPANIES?**

ANSWER

Yes, the NCCUSL has formed a study group to develop a possible uniform limited liability company act. The work of the NCCUSL will not be completed for some time.

The Subcommittee and the Montana Uniform Law Commissioners have agreed that it is appropriate for the Subcommittee to propose to the 1993 legislature the Act based on the ABA Prototype, with an understanding that the legislature should revisit the issues when the NCCUSL completes its work. At that time, after reviewing the NCCUSL proposal, the Subcommittee anticipates returning to the

legislature to recommend adoption of the NCCUSL proposals.

The Subcommittee believes that the need for legislation authorizing LLCs is immediate; as such, the Subcommittee does not recommend waiting for the NCCUSL to finish its work before enacting a "first generation" LLC Act.

QUESTION FOURTEEN **IS THERE ANY INFORMATIVE READING MATERIAL ON LLCs?**

ANSWER

In 1991-92, alone, there was a dramatic increase in the amount of legislation, academic study and comment about the LLC. *See* Keatinge, *et al., The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375 (1992), Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S. DAK L. REV. 44 (1992), Gazur and Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387 (1991), and Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U.L.Q. 417 (1992). Also see Roche, Jr., *Limited Liability Companies Offer Pass-Through Benefits Without S Corp. Restrictions*, J. TAX'N April 1991, 248-253. *See* Maxfield, et al., *Colorado Enacts Limited Liability Company Legislation*, COLO. LAW. June, 1991, 1032-1037. *See* Limited Liability Company Workshop, American Bar Assn. of Business Law (1991), which includes not only comments to the ABA Prototype Act, but detailed memorandum regarding the Act, as well as sample operating agreements in forms.

EXHIBIT 5
1-21-93
SB 146

Exhibit A

Comparison of Tax Attributes of S Corporations and Limited Liability Companies

Compiled by Professor Steve Bahls

Attribute	S Corporation	LLCs and Partnerships
1. Maximum number of owners	35	No limit
2. Do the following qualify as owners?		
(a) Nonresident aliens	No	Yes
(b) Corporations	No	Yes
(c) Partnerships	No	Yes
(d) Trusts	Generally, no	Yes
(e) Retirement plans	No	Yes
(f) Tax exempt entities	No	Yes
3. Two classes of stock permitted	No	Yes
4. Pass through taxation	Yes	Yes
5. IRS election required	Yes	No
6. Contributions	No recognition, but only if transferors are in control of corporation	No recognition or transfer by members
7. Distributions	Distribution of appreciated property results in gain	No recognition of gain upon distribution other than money until member sells property
8. Section 754 special basis adjustment for external sales of interests or certain distributions available	No	Yes
9. Owners may increase their bases for the amount of the entity debt under § 752	No	Yes

This exhibit is 101 pages long. The original is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

EXHIBIT 6
DATE 1-21-93
SB 146

PROTOTYPE LIMITED LIABILITY COMPANY ACT

DRAFT OF July 16, 1992

Drafted by the

WORKING GROUP ON LIMITED LIABILITY COMPANIES
SUBCOMMITTEE ON LIMITED LIABILITY COMPANIES
COMMITTEE ON PARTNERSHIPS AND
UNINCORPORATED BUSINESS ORGANIZATIONS
SECTION OF BUSINESS LAW
AMERICAN BAR ASSOCIATION

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The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association or any of its Sections or Committees and, accordingly, should not be construed as representing the policy of the American Bar Association.

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Publishers of Business and Taxation Texts

EXHIBIT NO. 7
DATE 1-21-93
BILL NO. SB146

Testimony in Support of SB 146

By Garth Jacobson

Representing the Office of the Secretary of State

Before the Senate Judiciary Committee

January 21, 1993

Mr. Chairman and members of the Senate Judiciary Committee, for the record I am Garth Jacobson representing the Office of the Secretary of State. I am here today to speak in support of SB 146, the Limited Liability Company Act. I am proud to say that I served on the State Bar of Montana Committee that prepared this legislation that creates Limited Liability Companies (LLC) in Montana. SB 146 will provide Montana one more reason for business to come to this state and promote our economy.

The focus of my testimony will be on the formation, operation and dissolution of LLCs. This area most impacts the Office of the Secretary of State.

A. Formation.

1. Articles of Organization. The Articles of Organization must be filed with the Secretary of State's office and contain the following information:

a. Name. The name of the LLC must be listed.

(1) Name must include "limited liability company", or "LLC".

(2) Distinguishable on the record filing standard. The name must be distinguishable on the record from any other entity or name (corporations, ABNs, Limited Partnerships, etc,) on file with the Secretary of State. The disclaimer "LLC" in itself will not make it distinguishable from other identical business names.

(3) Must identify Professional LLC. If the entity is a professional LLC then that is included in the disclaimer.

b. Latest date of dissolution. The statute makes no limitation on the duration of the LLC but cautious drafters may want to limit the term of the LLC.

c. Address of principal place of business and

registered office and agent. This is about the same as required in corporate articles information.

d. Form of management of LLC. The articles must specify the form of management the LLC will use.

(1) It must distinguish wheather it operates with member/managers or seperate managers.

(2) If the LLC has managers, then the articles must list the names of initial managers.

e. If it is a professional LLC then the articles must identify services being offered.

(1) Must meet professional organization requirements. There may be further restrictions imposed by the licensing entity which would be placed in the articles, such as a provision that requires all members to be licensed attorneys.

2. Filing requirements are the same as corporations.

a. Two copies of Articles of Organization are filed with Sec of State Office.

b. Fax filings are available. The standard fax filing procedures will apply for filing LLC documents.

c. Foreign LLCs must file application plus certificate of existence from jurisdiction of organization.

d. Must pay the filing fee of $20 and the license fee of $50. This is the same as the minimum corporate fees.

3. The articles must be executed by the person forming the organization which may or may not be a future member.

B. Operating Agreement. The operating agreement serves as the bylaws and partnership agreement rolled into one.

1. Not filed with Sec. of State.

2. Provides for election of managers, compensation, indemnification, meetings, sharing of profits and losses, sharing of distributions, etc.

3. If no operating agreement exists, then the statutes control.

C. Managers.

1. Managers can sign amendments and reports.

2. Managers can incur indebtedness and liabilities for LLC.

3. Manager duty of loyalty similar to P-Ship.

4. Managers do not have to be a member if the LLC does not have member/managers.

D. Transfer of membership. The transferability of membership is restricted and required unanimous approval of the remaining membership. If the transferability restrictions are altered then the tax status concerns arise.

E. Disassociation of a member. The disassociation of a member can cause one of three things to happen.

1. The interest of the disassociating member can be transferred to another person upon the consent of the remaining members.

2. The LLC will dissolve if no action is taken within 90 days of the disassociation.

3. The LLC can buy out the members interest and continue to operate. The members must vote to continue the operation following the disassociation.

F. Annual Reports will be required to be filed every year. No other maintenance activities are required to keep the entity operational to preserve the liability protection.

G. Merger. While there are many variations of mergers permitted in some states, Montana permits only mergers between LLCs.

H. Dissolution. Dissolution of an LLC can be triggered by any of the following events.

1. Voluntary dissolution. Following consent of the members, the LLC's articles of dissolution are filed with the Secretary of State.

2. Events Causing Dissolution. LLCs can be dissolved by events specified in either the articles of organization or statutes.

a. The articles of organization or organization agreement or the organization agreement may specify an event which triggers dissolution, ie, the term of existence expires.

b. The disassociation of a member and the failure of the LLC members to continue its existence.

3. Involuntary Dissolution. LLCs can be involuntarily dissolved by either judicial or administrative dissolution.

a. Judicial dissolution.

b. Administrative dissolution. An LLC can be involuntarily dissolved due to its failure to file an annual report.

As you can see, LLCs borrow features from both the Corporate and Partnership laws. There is a lot of flexibility in the creation and operation of these entities. This flexibility permits LLCs to meets the demands of the diverse business environment in Montana.

Additionally the Office of the Secretary of State believes that the creation of LLCs will have a slight direct positive fiscal impact on the general fund. Any fiscal impacts on the office will be offset by the revenues generated by filing and license fees. It will also promote business growth which in turn should improve our tax base through economic growth. I would refer any specific fiscal questions to Doug Mitchell.

In conclusion I urge your support of SB 146 and hope you give it a favorable recommendation.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 1-21-93
6 BILL NO. SB 146

STATES WITH A LIMITED LIABILITY COMPANY ACT

1.	Colorado	(1990)	11.	Oklahoma	(1992)
2.	Delaware	(1992)	12.	R.Island	(1992)
3.	Florida	(1982)	13.	Texas	(1991)
4.	Georgia	(1992)	14.	Utah	(1991)
5.	Iowa	(1992)	15.	Virginia	(1991)
6.	Kansas	(1990)	16.	W. Vir.	(1992)
7.	Louisiana	(1992)	17.	Wyoming	(1977)
8.	Maryland	(1992)			
9.	Minnesota	(1992)			
10.	Nevada	(1991)			

STATES THAT HAVE INTRODUCED LLCA TO STATE LEGISLATURE - (pending legislation)

		intro	re-intro	
1.	Arizona	2/91		
2.	Hawaii	3/92		passed Senate
3.	Illinois	4/91		
4.	Indiana	1/92		awaiting governor's signature
5.	Michigan	6/91,	4/92	passed House
6.	Mississ.	2/92		
7.	Missouri	1/93		
8.	Montana	1/93		
9.	Nebraska	2/92		post-poned, to be redrafted
10.	New Jers.	11/91,	5/92	
11.	New York	3/92,	1/93	
12.	Pennsyl.	5/91,	5/92, 10/92	
13.	S. Carol.	4/92		
14.	Tennessee	2/92		

STATES STUDYING LLCA LEGISLATION

1. North Carolina
2. South Dakota

STATES THAT HAVE REJECTED LLCA

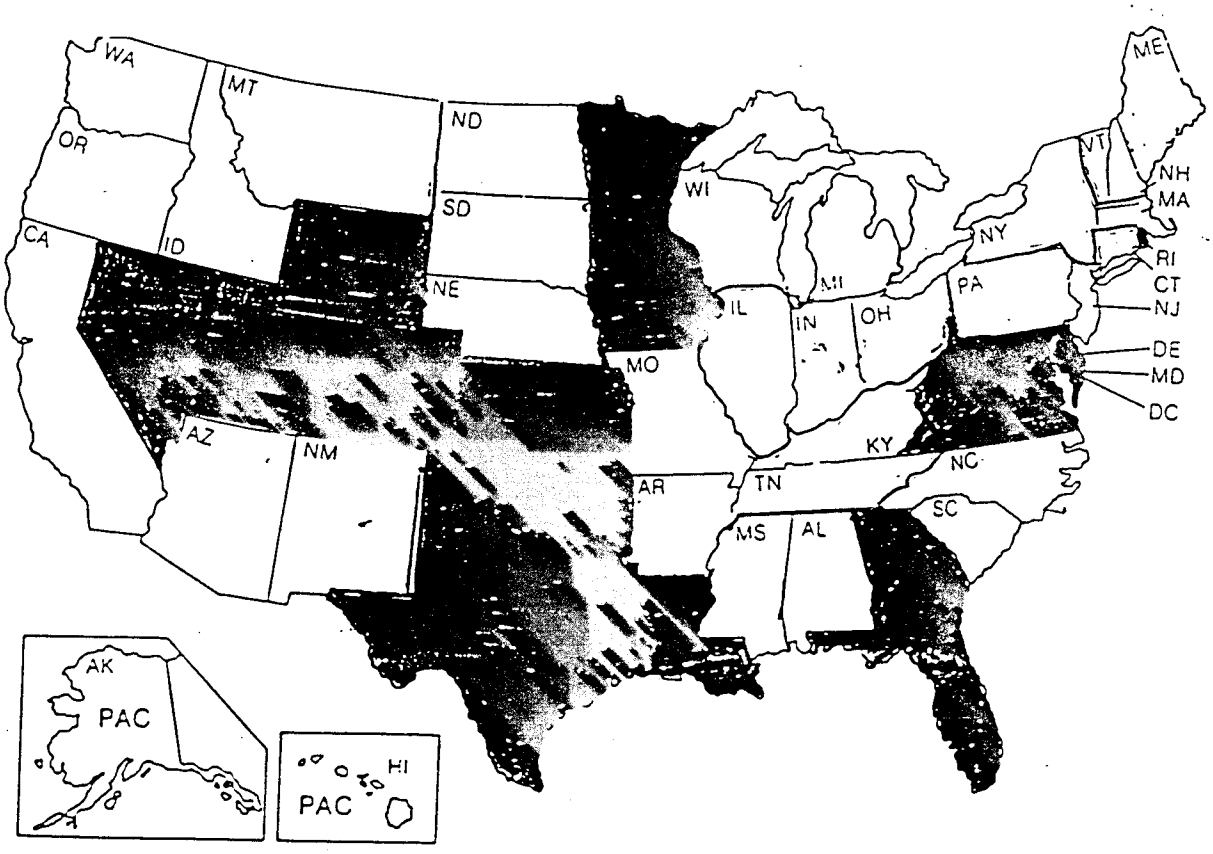
1.	New Hampshire	killed in committee

TOTALS: 33 STATES EITHER HAVE LEGISLATION, ARE IN THE PROCESS OF ENACTING LEGISLATION, OR ARE STUDYING LEGISLATION.

Data collected as of 1/93

STATES WITH LLC LEGISLATION

'93



MONTANA FOOD DISTRIBUTORS ASSOCIATION

2700 Airport Way • P.O. Box 5775 • Helena, Montana 59604 • (406) 449-6394 • 1-800-735-1082

Testimony of
W.E. Stevens
in support of SB 146
(Montana Limited Liability Company Act)

For the record my name is Bill Stevens, with the Montana Food Distributors Association and I am the elected President of the Montana Society of Association Executives.

I rise to speak generally for MSAE as it's member associations represent the vast majority of all small businesses in Montana.

I can speak specifically for MFDA as over the years we have sponsored many seminars and work shop sessions, using the best legal and accounting minds we could find, to assist our membership in determining how best to structure their business.

For many, the pit falls of both the partnership and the corporation options caused the owner of the family business to remain as a sole proprietorship, thus discouraging the son or daughter from becoming very involved and/or interested in the business.

The authorization of the limited liability company incorporating the best features of both corporations and partnerships will go a long way toward perpetuating the independent small businesses of Montana.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 1-21-93
BILL NO SB146

MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on January 25, 1993, at 10:08 a.m.

ROLL CALL

Members Present:
Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: NONE

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	NONE
Executive Action:	SB 117
	SB 37
	SB 78
	SB 55
	SB 129
	SB 153
	SB 146

EXECUTIVE ACTION ON SENATE BILL 146

Motion: Senator Harp MOVED TO AMEND SB 146, page 55, line 4, 13 and 17, page 56 line 4. The amendment would strike the word

ROLL CALL

SENATE COMMITTEE Judiciary DATE 1-25-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen	X		
Senator Grosfield	X		
Senator Halligan	X		
Senator Harp	X		
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock	X		
Senator Rye	X		

FC8

Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT

January 25, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 146 (first reading copy -- white), respectfully report that Senate Bill No. 146 be amended as follows and as so amended do pass.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

That such amendments read:

1. Page 55, lines 4, 13, and 17.
   Page 56, line 4.
Strike: "foreign"

-END-

M- Amd. Coord.
___ Sec. of Senate

"foreign".

Discussion: Ms. Lane explained this amendment would remove all references to "foreign" in the bill.

Vote: The motion to amend CARRIED UNANIMOUSLY.

Motion/Vote: Senator Harp MOVED SB 146 AS AMENDED DO PASS. Motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SENATE BILL 117

Motion: Senator Halligan MOVED TO AMEND SENATE BILL 117. (exhibit 1)

Discussion: Senator Halligan said he had talked to Senator Grosfield, and Representative Ryan, and others, as well as some of the people from the court to be sure they could continue mediation. He explained his process in working out the amendments.

Senator Towe commented on the language in section 2 describing abuse and asked what was meant by authorize or permit continuation of mediated negotiations. He asked Senator Halligan if that meant they could authorize, but not continue it. He asked if the key was continuation or what the meaning was.

Senator Halligan said the people who brought the idea to him, were adamant there be no sexual abuse and not any deviation at all. This was their "tempered" language. He said he was not completely comfortable with it but would let Representative Howard Toole work on it in the House. If the Court did not authorize continuation of mediation because probable cause had not been proved in a child abuse or neglect proceeding, the Court would initiate it.

Senator Towe asked if Senator Halligan was suggesting that there was any basis for not authorizing the mediation, but this only comes into play in connection with continuing it. Senator Halligan said no, this is not the best language, but the Court could say "I think there is reason to suspect that there is physical or emotional abuse. The key is that both parties would want mediation. If one party objected, then no."

Senator Towe said that is tempered somewhat by the language in the preceding section where it says only if one of the parties desire the mediation the court could order. It then would mean if one parties does not agree with it, they can not go forward. If both parties agree they can get mediation started but will not be able to force continuation of it.

Senator Halligan said in the existing statute when teacher or a parent's doctor sees a child in a setting their standard is "reason to suspect" and we are using that standard now. If a little less than probable cause is there, if a child was

case. **Office of Public Instruction (OPI)** offered some amendments on page 2 which are basically cleanup language. The amendment requires all cars to stop until the school bus drivers turn off the red flashing signal.

Proponents' Testimony:

Donna Hall, Hall Transit, Montana School Bus Contractors Association, said in 1992, seven children, nationwide, were hit and killed by cars not waiting for children to cross the street after getting off school buses. It is very difficult for bus drivers to identify the drivers driving past the buses, as the bus driver's first priority is taking care of the children.

Cheryl Thares, Great Falls Public Schools Transportation, presented written testimony. **EXHIBIT 1**

Jan Thompson, Office of Public Instruction, said she solicits support for SB 129.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

REP. ELLEN BERGMAN asked **SEN. DOHERTY** to clarify why people who drive past the buses aren't being caught. **SEN. DOHERTY** said bus drivers have been able to get some kind of identification of the car, the license plate, and some vague description of the driver; however, given the requirement to positively identify the driver, they haven't been able to prosecute.

REP. VOGEL said it is his and the court's understanding that, presently, under this statute, a police officer can write a citation to the owner of the vehicle when the school bus driver was unable to identify the driver. The owner of the vehicle is in violation. He asked **SEN. DOHERTY** the reasoning behind this bill. **SEN. DOHERTY** said that what **REP. VOGEL**, who is a police officer, can do in Billings is different from Great Falls. The reason for this bill, especially in the Great Falls area, is so that police officers can go after these offenders.

Closing by Sponsor: None.

HEARING ON SB 146

Opening Statement by Sponsor:

SEN. MIGNON WATERMAN, Senate District 22, Helena, presented

written testimony on this bill creating the Montana Limited Liability Company Act. EXHIBIT 2

Proponents' Testimony:

Steven Bahls, Professor of Law, University of Montana, Missoula, presented written testimony. EXHIBITS 3 and 4.

Garth Jacobson, Chief Counsel, Secretary of State, presented written testimony. EXHIBITS 5, 6, 7 and 8.

Richard M. Baskett, Attorney, Missoula, said his practice specializes in general partnerships and small businesses. He asked the committee to be aware of the way the legislation is drafted. It is possible, in one of these corporations, that the Internal Revenue Service looks for certain attributes to determine whether an organization is a partnership or a corporation. The statute provides only one form of organization, and the LLC must have the attributes that are set forward.

Tom Morrison, Attorney, Helena, said the LLCs which were inspired due to the 1986 Tax Reform Act have accomplished two things: 1) They have reversed tax rates when individuals are generally taxed at lower rates now compared to corporations. There was a time when individuals would be taxed as high as 99 percent, and corporations were only taxed 50 percent. Now it's totally reversed, and there's a real incentive for people who want to do business with an individual tax agreement rather than corporate tax. 2) "S" corporations are the "cure-all." They allow the limited liability that small businesses need for the privilege of being passed as individual proprietors or partners.

Opponents' Testimony: None.

Closing by Sponsor: None.

HEARING ON HB 396

Opening Statement by Sponsor:

REP. TIMOTHY WHALEN, HD 93, Billings, said he presented HB 396 at the request of his insurance agent. Several of the agent's clients were trying to purchase insurance but were on suspicion of driving under the influence of alcohol. Police officers asked these people to take a blood test so they could determine the amount of alcohol in their blood. Current Montana law contains an implied consent statute that, in essence, says if a person has a criminal record on his drivers license, consent is implied when the person is pulled over by law enforcement in order to take a breath test.

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL DATE February 4, '93

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Savles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow			✓
Rep. Diana Wyatt	✓		

HR:1993
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CS-09

HOUSE STANDING COMMITTEE REPORT

February 5, 1993

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 146 (third reading copy -- blue) be concurred in.

Signed: _____
Russ Fagg, Chair

Carried by: Rep. Jim Rice

Committee Vote:

290923SC.Hpf

REP. GRIMES asked CHAIRMAN FAGG why he doesn't want the effective date to be the fiscal year and whether everybody has to be notified. CHAIRMAN FAGG said the reason for his amendment that, the MCA books are not published and printed until October 1. If a date isn't documented specifically, the effective date is October 1, 1993; supposedly, people do get some kind of notice because the new codes are printed. If it's effective upon passage and approval and the MCA books aren't printed within four or five months, then during that four- or five-month period, nobody will be aware of the law changes.

Vote: The question was called on the amendment to give the bill an effective date of October 1, 1993. Motion carried 12-6. Those in favor of the amendment were CHAIRMAN FAGG, REPS. VOGEL, BERGMAN, BIRD, GRIMES, RICE, SAYLES, SMITH, TASH, TOOLE, WHALEN, and WINSLOW. Those voting against the amendment were REPS. BROWN, MCCULLOCH, CLARK, WYATT, BROOKE and RUSSELL.

Motion/Vote: REP. VOGEL MOVED SB 129 BE CONCURRED IN AS AMENDED. Motion carried 17-0. REP. WINSLOW did not vote, and REP. VOGEL will carry the bill on the House floor.

EXECUTIVE ACTION ON SB 146

Motion/Vote: REP. TOOLE MOVED SB 146 BE CONCURRED IN. Motion carried 17-0. No proxy for REP. WINSLOW. REP. RICE will carry the bill in the House.

EXECUTIVE ACTION ON HB 340

Motion: REP. BROWN MOVED HB 340 DO PASS.

Discussion:

REP. BROWN commented about an article in the Independent Record, December 1992, regarding the Tavern Association's discussion to take some of the onus off establishments that sell liquor and put some of the responsibility on the youth attempting to make a purchase of alcoholic beverages. REP. BROWN said he doesn't believe section 2 does what it's supposed to do, according to the question and answer portion of the hearing. There are parts in the bill that are not to the committee's liking, subsection (1), page 4, for example. He said the argument is too weak to strike because then the bill will only have two things to work against instead of all three. The intent of the bill is not to put too onerous an application on youth attempting to purchase. Possession statutes, he reminded the committee, are still very stiff, especially after the first time. Those statutes will not be changed.

REP. BROWN said he had called other states and asked if there is a standard state policy dealing with legal liabilities for bar

EXHIBIT
DATE 2-4-93
HB 146

Limited Liability Company Act

Executive Summary

The Montana Legislature has an opportunity to promote business development and improve its business climate through legislation prepared by a State Bar of Montana committee and to be introduced by Senator Waterman and cosponsored by Representative Rice and others. The Limited Liability Company Act creates a new business organization called a "limited liability company" (LLC).

Highlights

- An LLC is designed to combine the advantages of corporate - type limited liability protection for owners (called members), with pass-through tax treatment of partnerships. While LLC tax treatment is similar to S. Corporations it does not have all the pitfalls and limitations S. Corporations have.

- The liability of a member of a LLC is limited to the member's capital contribution.

- Through the articles of organization (filed with the secretary of state) and an operating agreement, members of an LLC have maximum flexibility to establish and manage the operating and financial structure of the entity. If the members fail to prepare an operating agreement then the legislation states how the entity will function.

- LLCs can operate like partnerships and have all members participate in the management functions or they can operate like a corporation and have designated managers handle their affairs.

- Membership interests may be transferred but only upon consent of the other members.

- The bill would permit professional LLCs. Professionals would still be liable for their own malpractice but they would not be personally liable for the mistakes of other members of their LLC.

- This bill would permit Montana to recognize out of state LLC and permit them to register and do business in the state.

Reasons For Passage

- This bill creates a useful alternative business organization designed for small businesses, joint ventures, real estate developments, businesses seeking foreign capital, family businesses and others.

- If Montana is to be competitive with other states seeking business development it needs this modern and flexible business alternative. Over one third of the other states now have LLCs.

EXHIBIT # 2
DATE 2/4/93
SB 146

EXECUTIVE SUMMARY

January 1993

QUESTIONS AND ANSWERS ABOUT LIMITED LIABILITY COMPANIES

QUESTION ONE — WHAT IS A LIMITED LIABILITY COMPANY?

ANSWER

The limited liability company (LLC) is a hybrid business entity created by combining the best of both worlds from a corporation and a partnership. It uniquely integrates the limited liability attribute of a corporation with the "pass-through" tax advantages enjoyed by a partnership.

The LLC is an evolutionary entity that provides significant advantages in today's business world. LLCs promise simplicity in formation, flexibility in planning and operation, limited liability, member control of the business, and pass through tax advantages without a lot of burdensome restrictions.

Professor Larry E. Ribstein, of George Mason University School of Law, observes the importance of limited liability companies.

> "Many lawyers and legislators have become interested in a new limited liability business form, the LLC, that lets firms adopt limited liability without many of the tax and other costs that once attended limited liability. [Over time] the partnership form of business will greatly diminish in importance. After a transitional period, partnership will survive, if at all, as a residual form for firms that have no customized agreement." Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U.L.Q. 417 (1992).

Given the flexibility and tax advantage of LLCs, LLCs are appropriate for entrepreneurial ventures with a small number of owners. LLCs are especially well suited for family businesses. Finally, LLCs may, in many cases, be appropriate for corporate joint ventures, real estate, farms and ranches, mining and oil and gas investments, high technology businesses and professional business.

QUESTION TWO — WHAT ARE THE ADVANTAGES OF LIMITED LIABILITY COMPANIES OVER OTHER BUSINESS ENTITIES?

ANSWER

(a) Consider Corporations and Partnerships.

Corporations have limited liability but do not receive any of the tax advantages that partnerships do. Partnerships on the other hand have significant tax benefits but no limited liability. LLCs possess the desirable attributes of both.

(b) Consider S Corporations.

Although S corporations, like LLCs, promise limited liability with pass through tax advantages, S corporations are burdened with restrictive requirements that LLCs avoid.

S corporations are limited to 35 shareholders or less. They cannot have multiple classes of stock and may not own a subsidiary. Shareholders in qualifying S corporations may not be other corporations, nonresident aliens, partnerships or most types of trusts. Further, S corporations do not receive all of the tax benefits that partnerships and LLCs enjoy. *See* Gazur & Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 454-457 (1991).

By contrast, the LLC, treated as a partnership, provides tremendous flexibility in planning distributions and special allocations. And LLCs enjoy the benefits of favorable adjustments in the LLC's basis in its assets when membership interests are sold. Overall, LLCs are easier to operate than S corporations because they involve less formality. In S corporations, the governing board must be elected. In LLCs, the members may manage without complying with corporate formalities. Exhibit A includes a fuller comparison between S Corporations and LLCs.

(c) Consider Limited Partnerships.

Whereas limited partnerships, like LLCs, provide for limited liability, only the limited partners, and not the general partners, of the limited partnership have limited liability. And limited partners lose this protection if they participate in the control of the partnership. By contrast, all members of the LLC are provided limited liability protection, regardless of the level of

participation in management.

(d) Consider Statutory Close Corporations.

While a statutory close corporation may operate with much of the flexibility of a LLC, the Internal Revenue Service has taken the position that statutory close corporations will not be treated as a partnership for tax purposes. The IRS states whenever an organization is incorporated, it cannot be considered a partnership. As such, a statutory close corporation cannot enjoy the tax advantages of a partnership.

(e) Consider Business Trusts.

Though authorized by the Montana Code Annotated, business trusts are rarely used. The tax law governing business trusts is uncertain and the enabling statute is outdated. Further, the limited liability aspects of business trusts are not clear when business trusts from one state seek to do business in other states. *See* Larry E. Ribstein, *supra* at 423-24.

(f) Comparison Conclusion.

For savvy business owners who have elected in the recent past to avoid double taxation through the use of an S corporation election, or have pursued limited liability through the limited partnership, the LLC promises to be an enticing alternative: it provides tax advantages without the restrictive S corporation requirements and promises limited liability to all members, even those who control and manage.

QUESTION THREE — **WHY THE LIMITED LIABILITY COMPANY NOW?**

ANSWER

In 1986, federal tax legislation repealed the General Utilities doctrine and Congress reinforced the double taxation of corporations and shareholders. Likewise, the inversion of the corporation and individual tax rates further compounded problems for businesses taxed as corporations. Before 1986, two states (Wyoming and Florida) had limited liability legislation in effect and much doubt existed as to whether LLCs would receive the benefit of taxation as a partnership.

In 1988, the IRS released Revenue Ruling 88-76, which stated properly that structured Wyoming LLCs would be taxed as partnerships. This

IRS ruling settled many doubts about the future of LLCs and broke the way for further states to begin legislation in this area.

In 1991, driven by changes in the tax laws and acting specifically in reaction to the 1988 Revenue Ruling, the American Bar Association (ABA) released a draft of the Prototype Limited Liability Company Act. In July of 1992, it released a new version of the Prototype Act. The 1992 prototype Act provides the solid foundation for states, such as Montana, to create LLC legislation.

Given the current status of the tax laws, there is no better time than now for limited liability companies. The time is ripe. Currently sixteen states have enacted LLC legislation. At least twenty other states, including Montana, have formed study groups to investigate the desirability of LLC legislation. Those proposing this Act in Montana believe that Montana needs LLC legislation in 1993.

QUESTION FOUR **WHY CREATE LLC LEGISLATION IN MONTANA?**

ANSWER

It is imperative to note that of the seventeen states with LLC legislation in effect as of September 1992, four of the states are in the Rocky Mountain region of the United States: Wyoming (1977), Colorado (1991), Nevada (1991), and Utah (1991).

Wyoming advertises that its LLC statute provides a tremendous benefit to those doing business in Wyoming. Montana business deserves the same opportunity and advantage afforded to business in neighboring states. To remain competitive, Montana should provide this opportunity immediately. Not only will LLCs provide an exciting alternative to more conventional forms of business organizations in our state, but legislation will facilitate a welcome improvement in Montana's business image. LLCs are pro-economic development, at virtually no cost. And as Montana strives to be a leader not a follower in the business world, it makes great sense that we seize this opportunity now.

National statistics show that the most growth in the business arena in the last decade has been in the area of small businesses. This is particularly true of business in Montana. But Montana small businesses need progressive statutes governing business organization. LLCs combine the best attributes of corporations and partnerships. LLCs, as an option, will be especially beneficial to small businesses, because LLCs avoid the complex steps involved in incorporating. The LLC is relatively easy to form. It can be done in one step by filing once with the Secretary of State. There is no need for bylaws and no elections of a board of directors. An oral operating agreement is

possible if that is what the owners want. There is great operational flexibility in a LLC. Anything that will help small business in Montana is urgently needed. If Montana wishes to compete for small business with surrounding states, LLC legislation is a practical necessity and a step toward the future.

QUESTION FIVE **WHAT IS THE HISTORY OF THE MONTANA LIMITED LIABILITY COMPANY ACT?**

ANSWER

In 1991, the Tax, Probate and Business Section of the Montana State Bar created a Limited Liability Company Subcommittee to study the progress of LLCs on the national level and to propose appropriate LLC legislation for Montana. The Subcommittee is comprised of a bipartisan, diverse body of attorneys, and includes private practitioners, members of state government and academia, as well as a law student associate member who has reviewed LLC laws of all jurisdictions. Committee members include Professor Steven C. Bahls, Chair and Reporter, Julieann McGarry, Coreporter, Richard M. Baskett, Garth B. Jacobson, Alan L. Joscelyn, and Thomas C. Morrison.

After much research and discussion, the Subcommittee members unanimously agreed to go forward with proposing LLC legislation for Montana. The members of the Subcommittee unanimously believed that it is in the interest of Montana businesses to adopt legislation as soon as possible. Its recommendations have been endorsed by the State Bar of Montana.

The Montana Subcommittee's proposal is based largely on the Prototype Limited Liability Company Act prepared by the American Bar Association in July, 1992. The ABA Section of Business Law that drafted the LLC Prototype has had a history of drafting successful, comprehensive legislation. This ABA Section is led by many of the nation's foremost experts on business organizations. Through the appropriate subcommittee this Section has drafted both the Model Business Corporation Act (adopted by 30 states), the Statutory Close Corporation Act, and the Model Nonprofit Corporation Act, all of which have been adopted in large part by the state of Montana. The ABA Model Acts have dominated state corporate governance statutes.

The ABA supplemented the Prototype LLC Act with a manual that includes in depth comment on each of the issues in the Act. The manual has been disseminated nationally to states interested in the Act. The Prototype Act's provisions are derived primarily from the Revised Uniform Limited Partnership Act (RULPA) and from enacted legislation of the eight states with Limited Liability Company (LLC) Acts in

existence as of 1991. In addition, the Prototype Act relies on provisions from the Model Business Corporation Act (MBCA).

Montana's Proposed Limited Liability Act is based primarily on the ABA Prototype Act, and incorporates its own unique provisions from Title 35 of the Montana Codes Annotated (Corporations, Partnerships, and Associations).

QUESTION SIX **HOW ARE LIMITED LIABILITY COMPANIES CLASSIFIED FOR TAX PURPOSES?**

ANSWER For a LLC to qualify for the tax status of a partnership, a 1988 IRS tax ruling requires that the LLC must lack at least two of the following four corporate characteristics:

1. Continuity of life.
2. Centralization of management.
3. Limited liability.
4. Free transferability of interests.

Because the corporate characteristic of limited liability will always exist in the LLC, the entity must relinquish two of the remaining ingredients to become eligible for partnership tax treatment. The Montana Limited Liability Company Act provides for a LLC that generally lacks continuity of life, the centralization of management and free transferability of interests. But the Montana Act is also sufficiently flexible as to allow the owners to tailor the organization to their own needs: a LLC may devise a different scheme from the Montana Act's default plan by providing for such under the operating agreement or articles of organization.

QUESTION SEVEN **WILL THE LIMITED LIABILITY COMPANY ACT ALLOW COMPANIES TO OPERATE IRRESPONSIBLY?**

ANSWER NO. Although the LLC Act offers the desirable mixture of limited liability with tax advantages, it does not allow LLCs to operate irresponsibly. The owners of an LLC receive no more protection than the protection received by corporate shareholders. Like a corporation's shareholders, each of the LLC's members have no liability to the LLC or its creditors beyond each member's initial contribution. The LLC, as a legal entity, is fully responsible for its debts and other liabilities and obligations it incurs. For example, if a LLC violates the Comprehensive Environment Response, Compensation and Liability Act (CERCLA) of 1980, the LLC will be liable as if it were a corporation.

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In addition, just as corporate managers may have personal liability under CERCLA, members of the LLC who are managers may have personal liability. Likewise, if a LLC member commits a tort and violates a law, that member receives no protection, just as shareholders and managers in corporations are not protected from torts they commit. *See* Larry E. Ribstein, *supra* at 440-41.

What the Montana LLC Act does promise is that if you are a member of the LLC and another member or manager violates a law or commits a tort, you are not personally liable for the tort committed by the other member or manager. Unlike a partnership, in which partners are personally liable for the torts and violations committed by another partner, the limited liability company shields members from the debts and liabilities of the organization and other individual members or managers. MCA § 35-10-305, 306 & 307.

For example, assume a construction company has become a limited liability company. Assume that the company was negligent in its design and erection of a building. The LLC, itself, and those who participated in the design or construction are responsible for the negligence. But just as corporate shareholders or officers who don't participate in the design or erection are not responsible, similarly situated members of a LLC are not responsible. *See, e.g., Little v. Grizzly Manufacturing*, 636 P.2d 839 (Mont. 1980).

QUESTION EIGHT **HOW IS A LIMITED LIABILITY COMPANY FORMED AND OPERATED?**

ANSWER The Montana Act involves a simple, relatively easy formation process. To comply with the purpose requirements of the Act, the LLC must be engaged in a lawful business under Montana law. The LLC must consist of one (1) or more persons. The LLC must set forth a name in the articles of organization. The name must not be deceptively similar to the names of other corporations or limited partnerships. The name must contain either the words "limited liability company" or the abbreviation "L.L.C." or the abbreviation "L.C.". The purpose of the name provisions, when read together, is to provide notice to the public and creditors that the members are not personally liable for the liability of the LLC. The LLC must file articles of organization with the Secretary of State and pay a fee. Once filing is complete, the Secretary of State issues a "certificate of organization" and the LLC becomes a recognized legal entity.

Once formed, entities have tremendous operating flexibility. The

majority of the provisions in the Montana Act offer entities the opportunity to select the default provision of the Act or to provide an alternative operating method, by merely indicating the entity's wish to do so in the operating agreement, or the articles of organization. So business organizations really can construct a LLC that suits their individual needs.

QUESTION TEN — **WHAT ARE THE HIGHLIGHTED DRAFTING ISSUES THAT THE SUBCOMMITTEE OF THE MONTANA LIMITED LIABILITY COMPANY ACT CONSIDERED?**

ANSWER — The following is a list of issues in the Montana LLC Act that compelled a great deal of discussion amongst Subcommittee members. Also included is the Subcommittee's decision on each debate. The Subcommittee welcomes and encourages any comments on the provisions that were ultimately included or excluded.

(a) Should there be a **presumption of member-management** or manager-management? The Subcommittee agreed that the Montana Act should be as "bullet proof" as possible for the purpose of obtaining tax treatment as a partnership. The Subcommittee sought to ensure such tax treatment for LLCs by making the default rule provide for member-management. This would ensure that LLCs in Montana lack centralized management, which is one of the four corporate characteristics that an entity may relinquish to receive partnership tax treatment. The Montana Act allows for modification for manager-management, but the entity may risk losing partnership tax treatment.

(b) Should **interests be freely assignable**? The Montana Act permits members to transfer interests in whole or in part; however, free assignability is limited under the Montana Act. The Act requires the unanimous consent of all other members before the assignee may become a member and receive all of the attributes of the transferring member's interest in the LLC. This unanimous consent requirement constitutes sufficient restriction to cause free transferability to be lacking for tax purposes. Entities may provide otherwise.

(c) Should the LLC have **continuity of life**? Merely specifying that the life of an organization is for a term of years is not enough to eliminate the characteristic of continuity of life. So the Montana Act does more. It provides that the limited liability company is

dissolved upon the certain events such as death, resignation, expulsion, bankruptcy etc., but allows the LLC to continue by amendment to the articles of organization or by the unanimous consent of the remaining members. This unanimous agreement permits the members to continue the business, thereby avoiding a dissolution, while ensuring that the LLC in the normal case lacks the corporate tax feature of continuity of life.

(d) What should be the default provision for **voting rights**? The Subcommittee agreed that the Montana Act should be as "bullet proof" as possible for the purpose of obtaining treatment as a partnership. To avoid any claim that management was centralized in the hands of the few, the Committee adopted the "one person, one vote" plan, as opposed to members voting "in proportion to their contributions to the capital of the LLC." The Subcommittee believed that the adopted method is more appropriate for service LLCs. Again, the Montana Act provides for flexibility and an organization may provide for a different voting method.

(e) Should the LLC Act be available to **professionals** in Montana? Yes. In other states, professionals, particularly CPAs, have expressed interest in operating as a LLC.

(f) Should the **allocation of profit and loss** be based on a capital interest method, or per capita method? The Committee decided the appropriate default rule of the Montana Act should be to distribute profits and losses equally. This rule is most appropriate for service providing LLCs. Capital intensive LLCs are most likely to be able to hire an attorney to make the appropriate adjustments to capital interest methods.

(g) Must the **operating agreement** be in writing? No. Because of the informal nature of many LLCs, operating agreements, like partnership agreements, need not be in writing.

(h) Should the law permit a *one-person LLC*? The Subcommittee has debated this issue. The Subcommittee was concerned that an enabling statute authorizing one-person limited liability companies might cause the IRS to question whether LLCs lack the "association" element of partnerships. In the final analysis, however, the Committee believed that the requirement of two members in a LLC would reduce the flexibility of LLCs.

QUESTION ELEVEN

DOES MONTANA REALLY NEED ANOTHER TYPE OF BUSINESS ORGANIZATION?

ANSWER

YES. The limited liability company is unlike any business entity we have now in this country. The LLC is a legitimate business alternative rooted in traditions of Partnership Association (in the United States) and the limitadus (from other countries such as Mexico and Germany). It is an evolutionary entity that makes sense in today's business world. LLCs promise simplicity in formation, flexibility in planning and operation, limited liability, member control of the business, and pass through tax advantages without a lot of burdensome restrictions. Making the LLC available to Montana business is of practical necessity, if Montana wishes to remain competitive with business in other states. It truly is an exciting business alternative that, given the opportunity, will, at no cost, improve Montana's business image.

QUESTION TWELVE

WHAT WILL THE MONTANA LIMITED LIABILITY COMPANY SUBCOMMITTEE DO TO HELP BUSINESSES AND THE BAR LEARN ABOUT LLCs?

ANSWER

If LLC legislation is enacted in Montana, the Subcommittee will make the Limited Liability Company Act available in a formbook and on computer disks at an inexpensive price. The Subcommittee has already worked extensively with the Montana Secretary of State's Office to create an acceptable filing form, and upon enactment of the Act, these filing forms will be available to all interested parties. Finally, the Subcommittee members, acting individually and on behalf of the Montana Bar, will provide CLEs to educate the legal and business communities in Montana about the advantages of the LLC.

QUESTION THIRTEEN

IS THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL) STUDYING LIMITED LIABILITY COMPANIES?

ANSWER

Yes, the NCCUSL has formed a study group to develop a possible uniform limited liability company act. The work of the NCCUSL will not be completed for some time.

The Subcommittee and the Montana Uniform Law Commissioners have agreed that it is appropriate for the Subcommittee to propose to the 1993 legislature the Act based on the ABA Prototype, with an understanding that the legislature should revisit the issues when the NCCUSL completes its work. At that time, after reviewing the NCCUSL proposal, the Subcommittee anticipates returning to the

legislature to recommend adoption of the NCCUSL proposals.

The Subcommittee believes that the need for legislation authorizing LLCs is immediate: as such, the Subcommittee does not recommend waiting for the NCCUSL to finish its work before enacting a "first generation" LLC Act.

QUESTION FOURTEEN **IS THERE ANY INFORMATIVE READING MATERIAL ON LLCs?**

ANSWER

In 1991-92, alone, there was a dramatic increase in the amount of legislation, academic study and comment about the LLC. *See* Keatinge, *et al., The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375 (1992), Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S. DAK L. REV. 44 (1992), Gazur and Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387 (1991), and Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U.L.Q. 417 (1992). Also see Roche, Jr., *Limited Liability Companies Offer Pass-Through Benefits Without S Corp. Restrictions*, J. TAX'N April 1991, 248-253. *See* Maxfield, et al., *Colorado Enacts Limited Liability Company Legislation*, COLO. LAW. June, 1991, 1032-1037. *See* Limited Liability Company Workshop, American Bar Assn. of Business Law (1991), which includes not only comments to the ABA Prototype Act, but detailed memorandum regarding the Act, as well as sample operating agreements in forms.

EXHIBIT 3
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Exhibit A

Comparison of Tax Attributes of S Corporations and Limited Liability Companies

Compiled by Professor Steve Bahls

Attribute	S Corporation	LLCs and Partnerships
1. Maximum number of owners	35	No limit
2. Do the following qualify as owners?		
(a) Nonresident aliens	No	Yes
(b) Corporations	No	Yes
(c) Partnerships	No	Yes
(d) Trusts	Generally, no	Yes
(e) Retirement plans	No	Yes
(f) Tax exempt entities	No	Yes
3. Two classes of stock permitted	No	Yes
4. Pass through taxation	Yes	Yes
5. IRS election required	Yes	No
6. Contributions	No recognition, but only if transferors are in control of corporation	No recognition or transfer by members
7. Distributions	Distribution of appreciated property results in gain	No recognition of gain upon distribution other than money until member sells property
8. Section 754 special basis adjustment for external sales of interests or certain distributions available	No	Yes
9. Owners may increase their bases for the amount of the entity debt under § 752	No	Yes

EXHIBIT # 4
DATE 2/4/93
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Testimony of
Steven C. Bahls
in support of
SB 146
(Montana Limited Liability Company Act)

My name is Steven C. Bahls. I am the Associate Dean and a Professor at the University of Montana School of Law. I teach Business Organizations I and II, as well as agricultural law. I have had the pleasure of serving as Chair of the Limited Liability Company Subcommittee of the Tax, Probate and Business Section of the State Bar of Montana. It is this subcommittee that drafted SB 146.

Limited liability companies are a relatively new form of business organization in the United States. Limited liability companies originated in Germany in 1892 and are now extensively used in Europe and Latin America. Authorized by legislatures in approximately one third of the states, limited liability companies are a hybrid business entity created by combining the best of both worlds from corporations and partnerships. Limited liability company owners, like corporate shareholders, are not personally responsible for the debts of the business. Section 23. Owners of limited liability companies, however, receive the tax benefits of taxation as partners. Revenue Ruling 88-76. These tax benefits include taxation of the income of a LLC to the owners and not to the LLC. (Corporations, by contrast, are generally subject to double taxation at both the corporate level and at the shareholder level.) Owners of limited liability companies receive the ability to offset any losses incurred in the business against other personal income. Authorizing limited liability companies in Montana will allow Montana business a form of business organization providing the same advantages as Wyoming and several other states in our region provide.

The LLC is an evolutionary entity that provides significant advantages in today's business world. LLCs promise simplicity in formation, flexibility in planning and operation, limited liability, member control of the business and pass through tax advantages without a lot of burdensome restrictions. Given the flexibility and tax advantage of LLCs, LLCs are appropriate for entrepreneurial ventures with a small number of owners. LLCs are especially well suited for family businesses. Finally, LLCs may, in many cases, be appropriate for corporate joint ventures, real estate,

farm and ranch businesses, mining and oil and gas investments, high technology businesses and professional businesses.

HISTORY OF LLCs

In 1986, federal tax legislation repealed many of the tax advantages given corporations, thereby reinforcing the double taxation of corporations and shareholders. Likewise, the inversion of the corporation and individual tax rates further compounded problems for businesses taxed as corporations. As a result, business had a greater incentive to organize as partnerships. Many businesses were hesitant to organize as partnerships, however, because owners of partnerships (unlike shareholders) are jointly liable for all partnership debts. The state of Wyoming had enacted legislation creating limited liability companies. Wyoming's legislation was modelled after the German model. Wyoming touted its limited liability company legislation as offering both partnership tax attributes and corporate limited liability. In 1988, the IRS released Revenue Ruling 88-76, which stated properly that structured Wyoming LLCs would be taxed as partnerships, even though its owners had limited liability. This IRS ruling settled many doubts about the future of LLCs and broke the way for further states to begin legislation in this area.

In 1991, driven by changes in tax laws and acting (specifically in reaction to the 1988 Revenue Ruling), the American Bar Association (ABA) released a first draft of the Prototype Limited Liability Company Act. This prototype Act provides the solid foundation for states, such as Montana, to create LLC legislation.

In 1991, the Tax, Probate and Business Section of the Montana State Bar created a Limited Liability Company Subcommittee to study the progress of LLCs on the national level and to propose appropriate LLC legislation for Montana. The objective of the Subcommittee was to provide Montana businesses with the same benefits other states authorizing LLCs provide. The Subcommittee is comprised of a bipartisan, diverse body of attorneys, and includes private practitioners, members of state government and academia, as well as a law student associate member who has reviewed LLC laws of other jurisdictions.

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After much research, discussion and several all day meetings, the Subcommittee members unanimously agreed to go forward with proposing LLC legislation for Montana. The members of the Subcommittee unanimously believed that it is in the interest of Montana businesses to adopt legislation as soon as possible. The Subcommittee's proposal was recently endorsed by the State Bar of Montana. Governor Racicot has also stated his support for LLC legislation.

The Montana Subcommittee's proposal is based largely on the version of the Prototype Limited Liability Company Act prepared by the American Bar Association in July of 1992. The ABA Section of Business Law that drafted the LLC Prototype has had a history of drafting successful, comprehensive legislation. This ABA Section is led by many of the nation's foremost legal experts on business organizations. Through the appropriate subcommittee this Section has drafted both the Model Business Corporation Act (adopted by 30 states), the Statutory Close Corporation Act, and the Model Nonprofit Corporation Act, all of which have been adopted in large part by the state of Montana. The ABA Model Acts have dominated state corporate governance statutes. Senate Bill 146 is based on the ABA Prototype, but has been revised by the Montana Bar Committee to better meet the needs of Montana businesses. Revisions include standardized filing provisions with the secretary of state, (sections 12-18) as well as revisions limiting the ability of professionals to escape from liability for malpractice. Section 77.

At this point, I would like the Committee to receive a copy of the ABA Prototype Limited Liability Company Act (with Official Commentary) and the Montana Comments to the Montana Limited Liability Company Act. These materials, if the bill is enacted, will provide valuable guidance in its interpretation.

DESCRIPTION OF LLC

As I previously indicated, the Montana Limited Liability Company Act borrows provisions from both the corporate and partnership law. It borrows these corporate characteristics.

- Owners of limited liability companies, like corporate shareholders, are generally not liable for the debts of the limited liability company. Section 23. Exceptions include when owners guarantee debts of a LLC or when owners personally commit wrongs while acting for an

LLC. See Official ABA Commentary and Montana Comments. Section 23. For both of these exceptions, owners will be personally liable for the debts or damages.

- Because limited liability companies are a separate legal entity, limited liability companies must file organizational papers with the secretary of state. Section 9. Limited liability companies must maintain a registered agent and register office in this state. Section 5. Like corporations, limited liability companies must file annual reports with the secretary of state. Section 15. The bill directs the secretary of state to recoup the costs of processing documents by assessing filing fees. Section 18(3).
- When limited liability companies dissolve, like corporations, its owners hold the assets of the limited liability company in trust for creditors. Section 54.

Limited liability companies also possess several important partnership attributes. Many of the partnership attributes of the limited liability company must be included in the legislation in order that limited liability companies are taxed as partnerships.

- Limited liability companies, like partnerships, do not have continuity of life. As such, if an owner of a limited liability company dies, resigns, or files bankruptcy (and the members interest is not purchased by the limited liability company within 90 days), the limited liability company is dissolved. Sections 45 and 46.
- Limited liability companies are generally not managed by managers or by a board of directors, but are instead member managed. Section 24. Unless the organizational documents provide otherwise, each member has one vote. Section 26.
- An interest in limited liability companies, unlike corporate stock, is not freely transferable. As with a partnership interest, an owner of a limited liability company that seeks to transfer his or her interest, transfers only an interest in any distributions from the limited liability company. Section 41. The transferee does not gain the right to manage or vote.
- Limited liability companies are flexible like partnerships. Unlike corporations, there are no rigid requirements for meetings or for a

board of directors. Instead, the operation of a limited liability company is governed by an operating agreement, to be entered into among its owners. Section 2(16).

ILLUSTRATION OF WHY LLCs ARE ATTRACTIVE

To illustrate the advantages of a LLC, consider family members who want to operate a small business together. Right now the main choices are operating as a partnership or as a corporation. Both of these familiar business entities offer serious drawbacks along with their benefits. Simplicity is a partnership's main appeal: It's easy to set up and requires no bylaws, board of directors or annual meeting. A partnership is not subject to taxation. All income is divided among the partners, who pay taxes on their share profits at individual rates, which are often lower than corporate rates. Partnership losses can be used to offset a partner's other income.

The downside of partnerships is that each partner is fully liable for the debts of the partnership. If you and your brother-in-law were partners on a farm where a visitor got badly hurt, both of you would be equally responsible for the damages caused by the injury even if the injury was the result of just one partner's negligence.

Fear of such liability has prompted hundreds of small businesses to incorporate. The protection they receive is substantial: Shareholders of a properly structured family corporation are no more responsible for the corporation's debts than General Motors shareholders are for court judgements that may be brought against GM.

But the corporation has to be run properly to maintain that legal shield. The law requires that shareholders elect a board of directors and officers. The corporation also has to hold a business meeting at least once a year and obey the required corporate formalities. Miss a requirement and a court may decide the business is not really a corporation and that the owners should be held personally responsible for its debts.

Worse yet, a corporation's income is subject to double taxation. First the corporation pays taxes on its earnings; then it pays what's left to the shareholders as dividends and the shareholders pay taxes on it as individuals.

It is true that a small business such as a family farm can declare itself an "S corporation," and avoid the corporate tax. An S corporation is taxed like a partnership. But that choice comes with restrictions - no corporate owners, no foreign owners, no more than 35 shareholders and fewer business related tax advantages than partnerships are allowed.

Most significantly for small business owners, an S corporation cannot have more than one class of owners. This precludes a popular estate planning option in which the family-owned corporation issues preferred stock to the parents and common stock to the children, in hope of providing the children with a greater share of the business' income over time.

The shortcomings of operations and partnerships and corporation explain the appeal of the limited liability company. It offers most of the simplicity, flexibility and tax advantages of a partnership, and the same protection from liability as a corporation.

RESPONSIBLE OPERATION OF BUSINESS

The Montana Limited Liability Company Act has been drafted to encourage responsible operation of business. Professionals, such as attorneys, accountants and doctors may operate as professionally limited liability companies; but these professionals, by law, would remain liable for their own malpractice and the malpractice of those they supervise. Section 77. The provision governing professional LLC are based on the provision restricting the operation of Montana corporations. Similarly, the legislation does not change the rule that business persons who commit torts are liable for their torts. See Montana Comments.

For example, assume a construction company has become a limited liability company. Assume that the LLC was negligent in its design and erection of a building. The LLC, itself, and those who participated in the design or construction are responsible for the negligence. But just as corporate shareholders or officers who don't participate in the design or construction are not responsible, similarly situated members of a LLC are not responsible. *See, e.g., Little v. Grizzly Manufacturing,* 636 P. 2d 839 (Mont. 1980).

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CONCLUSION

It is imperative to note that of the approximately one third of the states with LLC legislation in effect, four of the states are in the Rocky Mountain region of the United States: Wyoming (1977), Colorado (1991), Nevada (1991), and Utah (1991). Wyoming advertises that its LLC statute provides a tremendous benefit to those doing business in Wyoming. Montana business deserves the same opportunity and advantage afforded to business in neighboring states. To remain competitive, Montana should provide this opportunity immediately. Not only will LLCs provide an exciting alternative to more conventional forms of business organizations in our state, but legislation will facilitate a welcome improvement in Montana's business image. LLCs are pro-economic development, at virtually no cost. And as Montana strives to be a leader not a follower in providing for small business, it makes great sense that Montana seize this opportunity now.

National statistics show that the most growth in the business arena in the last decade has been in the area of small business. I suspect this is particularly true of business in Montana. Responsible legislation that will help small business in Montana is urgently needed. If Montana wishes to compete for small business with surrounding states, LLC legislation is a practical necessity and a step toward the future.

Ag Law

By STEVEN BAHLS and JANE EASTER BAHLS

A promising solution to the business-structure riddle

Should you operate the family farm as a partnership or as a corporation? Your best answer may be "neither." At least 16 state legislatures have enacted laws that permit a new type of business structure called the limited liability company. Most other states are considering such legislation.

The LLC, meant to combine the best of the corporation and the partnership, is a needed alternative: Both of the familiar choices offer serious drawbacks along with their benefits. Simplicity is a partnership's main appeal: It's easy to set up and requires no bylaws, board of directors or annual meeting. And a partnership is not subject to taxation. All income is divided among the partners, who pay taxes on their share at individual rates, which are often lower than corporate rates.

The downside is that each partner is fully liable for the debts of the partnership. That's a sobering thought. If you and your brother-in-law were partners on a farm where an employee or visitor got badly hurt, both of you would be equally responsible for the legal bills even if the injury was the result of just one partner's negligence.

Fear of such liability has prompted hundreds of family farmers to incorporate. The protection they receive is substantial: Shareholders of a properly structured farm corporation are no more responsible for the corporation's debts than General Motors shareholders are for court judgments that may be brought against GM.

But the corporation has to be run properly to maintain that legal shield. The law requires that shareholders elect a board of directors and officers. The corporation also has to hold a business meeting at least once a year and file an annual report with the state. Miss a requirement and a court may decide the business is not really a corporation and that the owners should be held personally responsible for its debts.

Worse, a corporation's income is subject to double taxation. First the corporation pays taxes on its earnings; then it pays what's left to the shareholders as dividends and the shareholders pay taxes on it as individuals.

True, a small business such as a family farm can declare itself an "S corporation," and avoid the corporate tax; an S corporation is taxed like a partnership. But that choice comes with restrictions — no subsidiaries, no more than 35 shareholders (none of whom may be a partnership, a trust or another corporation) and fewer business-loss write-offs than partnerships are allowed.

Limited liability companies include many of the best features of partnerships and corporations.

Most significantly for farmers, an S corporation cannot have more than one class of owners. That precludes a popular retirement plan in which the corporation issues preferred stock to the parents and common stock to the children, in hope of providing the children with a greater share of the farm's income over time.

The shortcomings of the available forms explain the appeal of the LLC: It offers most of the simplicity, flexibility and tax advantages of a partnership, and the same protection from liability as a corporation.

Limited liability companies as a form of business organization began to attract attention after the Tax Reform Act of 1986 made corporate structures less attractive by increasing the corporate tax rate and eliminating some of

Roger Woodworth

the exceptions to corporate double taxation. LLCs really caught on after the IRS ruled in 1988 that LLCs authorized by an obscure Wyoming statute could provide shareholders with both a corporation's liability shield and a partnership's tax benefits.

Other states decided to follow Wyoming's example. States that currently have rules governing LLCs include Illinois, Minnesota, Kansas and Texas.

Iowa allows LLCs but forbids them from owning or leasing farmland. Designed to prevent big LLCs from taking over farmland, the statute fails to provide an exception for family farms.

In general, the rules make creating an LLC quite trouble-free. Two or more persons may set one up merely by filing a simple document with the state and paying a modest fee. The members of the LLC then sign an agreement that governs how the business is managed, how membership interests are transferred and how profits are shared.

LLCs are most appropriate for new farm businesses and existing partnerships that want to convert; corporations that turn into LLCs are likely to be taxed on the conversion. Of course, to make sure an LLC is right for you and to set it up correctly, consult your attorney for guidance.

Steven Bahls is a law professor at the University of Montana in Missoula. Jane Easter Bahls is a FARM FUTURES contributing editor.

EXHIBIT 4
DATE 2-4-93
SB-146

OFFICE OF THE GOVERNOR

STATE OF MONTANA

MARC RACICOT
GOVERNOR

STATE CAPITOL
HELENA, MONTANA 59620-0801

January 11, 1993

Steven Bahls
Associate Dean and Professor
University of Montana
School of Law
Missoula MT 59812-1071

Dear Steven:

I will support the legislation proposed by the State Bar of Montana authorizing a new type of business entity called Montana Limited Liability Companies.

The Internal Revenue Services' approval of Limited Liability Companies certainly requires that Montana adopt this type of business entity in order to remain competitive with surrounding states.

Since the Department of Revenue does not anticipate a significant loss of revenue and since the public is properly protected, there would not appear to be any major opposition to legislation of this nature.

Best of luck as you shepherd the bill through the legislative process.

Happy holidays.

Sincerely,

Marc Racicot

MARC RACICOT
Governor

TELEPHONE: (406) 444-3111 FAX: (406) 444-5529

EXHIBIT 5
DATE 2-4-93
SB 146

Testimony in Support of SB 146

By Garth Jacobson

Representing the Office of the Secretary of State

Before the House Judiciary Committee

February 4, 1993

Mr. Chairman and members of the House Judiciary Committee, for the record I am Garth Jacobson representing the Office of the Secretary of State. I am here today to speak in support of SB 146, the Limited Liability Company Act. I am proud to say that I served on the State Bar of Montana Committee that prepared this legislation that creates Limited Liability Companies (LLC) in Montana. SB 146 will provide Montana one more reason for business to come to this state and promote our economy.

The focus of my testimony will be on the formation, operation and dissolution of LLCs. This area most impacts the Office of the Secretary of State.

A. Formation.

1. Articles of Organization. The Articles of Organization must be filed with the Secretary of State's office and contain the following information:

a. Name. The name of the LLC must be listed.

(1) Name must include "limited liability company", or "LLC".

(2) Distinguishable on the record filing standard. The name must be distinguishable on the record from any other entity or name (corporations, ABNs, Limited Partnerships, etc,) on file with the Secretary of State. The disclaimer "LLC" in itself will not make it distinguishable from other identical business names.

(3) Must identify Professional LLC. If the entity is a professional LLC then that is included in the disclaimer.

b. Latest date of dissolution. The statute makes no limitation on the duration of the LLC but cautious drafters may want to limit the term of the LLC.

c. Address of principal place of business and

registered office and agent. This is about the same as required in corporate articles information.

d. Form of management of LLC. The articles must specify the form of management the LLC will use.

(1) It must distinguish wheather it operates with member/managers or seperate managers.

(2) If the LLC has managers, then the articles must list the names of initial managers.

e. If it is a professional LLC then the articles must identify services being offered.

(1) Must meet professional organization requirements. There may be further restrictions imposed by the licensing entity which would be placed in the articles, such as a provision that requires all members to be licensed attorneys.

2. Filing requirements are the same as corporations.

a. Two copies of Articles of Organization are filed with Sec of State Office.

b. Fax filings are available. The standard fax filing procedures will apply for filing LLC documents.

c. Foreign LLCs must file application plus certificate of existence from jurisdiction of organization.

d. Must pay the filing fee of $20 and the license fee of $50. This is the same as the minimum corporate fees.

3. The articles must be executed by the person forming the organization which may or may not be a future member.

B. Operating Agreement. The operating agreement serves as the bylaws and partnership agreement rolled into one.

1. Not filed with Sec. of State.

2. Provides for election of managers, compensation, indemnification, meetings, sharing of profits and losses, sharing of distributions, etc.

3. If no operating agreement exists, then the statutes control.

C. Managers.

1. Managers can sign amendments and reports.

2. Managers can incur indebtedness and liabilities for LLC.

3. Manager duty of loyalty similar to P-Ship.

4. Managers do not have to be a member if the LLC does not have member/managers.

D. Transfer of membership. The transferability of membership is restricted and required unanimous approval of the remaining membership. If the transferability restrictions are altered then the tax status concerns arise.

E. Disassociation of a member. The disassociation of a member can cause one of three things to happen.

1. The interest of the disassociating member can be transferred to another person upon the consent of the remaining members.

2. The LLC will dissolve if no action is taken within 90 days of the disassociation.

3. The LLC can buy out the members interest and continue to operate. The members must vote to continue the operation following the disassociation.

F. Annual Reports will be required to be filed every year. No other maintenance activities are required to keep the entity operational to preserve the liability protection.

G. Merger. While there are many variations of mergers permitted in some states, Montana permits only mergers between LLCs.

H. Dissolution. Dissolution of an LLC can be triggered by any of the following events.

1. Voluntary dissolution. Following consent of the members, the LLC's articles of dissolution are filed with the Secretary of State.

2. Events Causing Dissolution. LLCs can be dissolved by events specified in either the articles of organization or statutes.

a. The articles of organization or organization agreement or the organization agreement may specify an event which triggers dissolution, ie, the term of existence expires.

b. The disassociation of a member and the failure of the LLC members to continue its existence.

3. Involuntary Dissolution. LLCs can be involuntarily dissolved by either judicial or administrative dissolution.

a. Judicial dissolution.

b. Administrative dissolution. An LLC can be involuntarily dissolved due to its failure to file an annual report.

As you can see, LLCs borrow features from both the Corporate and Partnership laws. There is a lot of flexibility in the creation and operation of these entities. This flexibility permits LLCs to meets the demands of the diverse business environment in Montana.

Additionally the Office of the Secretary of State believes that the creation of LLCs will have a slight direct positive fiscal impact on the general fund. Any fiscal impacts on the office will be offset by the revenues generated by filing and license fees. It will also promote business growth which in turn should improve our tax base through economic growth.

In conclusion I urge your support of SB 146 and hope you give it a favorable recommendation.

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STATES WITH A LIMITED LIABILITY COMPANY ACT

1.	Colorado	(1990)	11.	Oklahoma	(1992)
2.	Delaware	(1992)	12.	R.Island	(1992)
3.	Florida	(1982)	13.	Texas	(1991)
4.	Georgia	(1992)	14.	Utah	(1991)
5.	Iowa	(1992)	15.	Virginia	(1991)
6.	Kansas	(1990)	16.	W. Vir.	(1992)
7.	Louisiana	(1992)	17.	Wyoming	(1977)
8.	Maryland	(1992)			
9.	Minnesota	(1992)			
10.	Nevada	(1991)			

STATES THAT HAVE INTRODUCED LLCA TO STATE LEGISLATURE - (pending legislation)

		intro	re-intro	
1.	Arizona	2/91		
2.	Hawaii	3/92		passed Senate
3.	Illinois	4/91		
4.	Indiana	1/92		awaiting governor's signature
5.	Michigan	6/91,	4/92	passed House
6.	Mississ.	2/92		
7.	Missouri	1/93		
8.	Montana	1/93		
9.	Nebraska	2/92		post-poned, to be redrafted
10.	New Jers.	11/91,	5/92	
11.	New York	3/92,	1/93	
12.	Pennsyl.	5/91,	5/92, 10/92	
13.	S. Carol.	4/92		
14.	Tennessee	2/92		

STATES STUDYING LLCA LEGISLATION

1. North Carolina
2. South Dakota

STATES THAT HAVE REJECTED LLCA

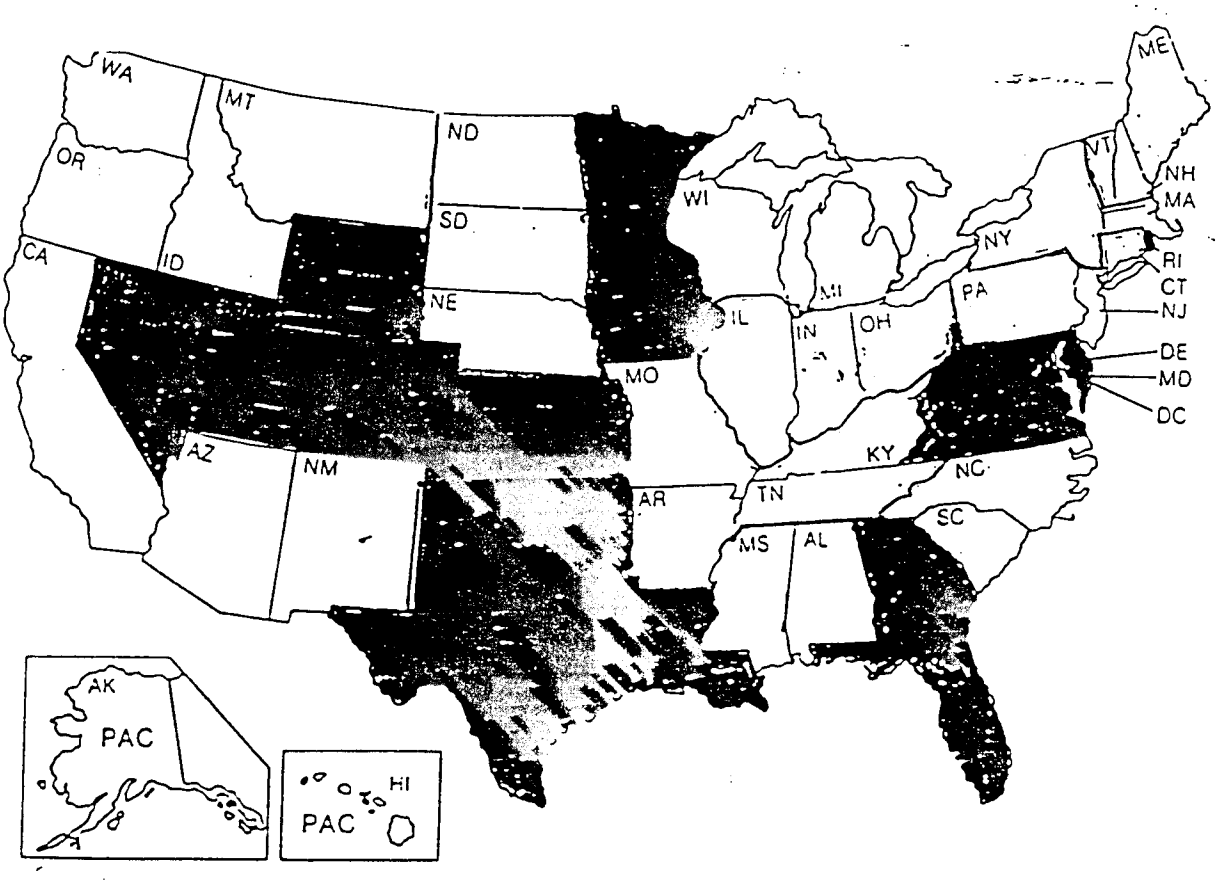
1.	New Hampshire	killed in committee

TOTALS: 33 STATES EITHER HAVE LEGISLATION, ARE IN THE PROCESS OF ENACTING LEGISLATION, OR ARE STUDYING LEGISLATION.

Data collected as of 1/93

STATES WITH LLC LEGISLATION

'93



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COMMENTS TO THE MONTANA LIMITED LIABILITY COMPANY ACT

INTRODUCTORY COMMENTS

These Comments are intended to assist with interpreting the Montana Limited Liability Act. These Comments were drafted by Professor Steven C. Bahls and Attorney Julie McGarry and adopted by the Limited Liability Company Subcommittee of the State Bar of Montana's Tax, Probate and Business Section.

All sections of the Montana Limited Liability Company Act, unless otherwise specified, are based on the Prototype Limited Liability Company Act (July 16, 1992) drafted by the American Bar Association's Subcommittee on Limited Liability Companies of the Partnerships and Unincorporated Business Organizations Committee. The Montana Limited Liability Company Subcommittee believes that the Commentary to the ABA Prototype will be of substantial help in interpreting the Montana Limited Liability Company Act.

GENERAL COMMENTS

As a general rule, a Montana LLC should be considered as a separate entity. The drafters agree with Introductory Comment Eight accompanying the ABA Prototype Act:

> "The Committee has concluded that an LLC should be generally considered a separate entity for all purposes rather than merely an aggregate of individual members. Although this decision was made, the term entity was not included in the definition of limited liability company. Thus, for example, the Prototype makes clear that the entity itself owns property and engaged in litigation. This should prevent the confusion resulting in partnerships from the fact that the Uniform Partnership Act does not explicitly characterize the partnership, and contains both aggregate features, such as technical dissolution on dissociation of a member, and entity features, such as the partnership's power to take title to property."

The failure of a limited liability company to observe the formalities customarily followed by business corporations or requirements relating to the exercise of its powers or management of its business and affairs is not a ground for courts disregarding the separate entity status of an LLC or for imposing personal liability on the members for liabilities of the limited liability company. Courts should not pierce the limited liability company "veil" merely as a result of failure to follow normal formalities required of a corporation. See Keatinge et al., The Limited Liability Company: A Study of the Emerging Entity, 47 BUS. LAW. 375, 446 (1992). See also Gazur and Goff, Assessing the Limited Liability Company, 41 CASE WESTERN RES. L. REV. 401-403 (1991). Of course, the court may still pierce the limited liability company veil if piercing the veil otherwise is necessary to prevent fraud or necessary to achieve equity.

See, e.g., Jody J. Brewster (comment), Piercing the Corporate Veil in Montana, MONT. L. REV. (1983).

The Montana Limited Liability Company Act has been drafted so that limited liability companies not modifying the statutory default rules qualify for the tax status of a partnership. Internal Revenue Service Revenue Ruling 88-76 requires that the LLC must lack at least two of the following four corporate characteristics:

1. Continuity of life.
2. Centralization of management.
3. Limited liability.
4. Free transferability of interests.

Because the corporate characteristic of limited liability will always exist in the LLC, the entity must relinquish two of the remaining ingredients to become eligible for partnership tax treatment. The Montana Limited Liability Company Act provides for a LLC that generally lacks continuity of life, the centralization of management and free transferability of interests. But the Montana Act is also sufficiently flexible as to allow the owners to tailor the organization to their own needs: an LLC may devise a different scheme from the Montana Act's default plan by providing for such under the operating agreement or articles of organization. It is expected and intended that the Montana Department of Revenue apply the same analysis as that applied in Revenue Ruling 88-76 to determine that LLCs are taxed as partnerships in Montana.

§ 1. Short title.

Montana Comment: This section is modeled after § 101 of the ABA Prototype Act.

§ 2. Definitions.

Montana Comment: All definitions are based on § 101 of the ABA Prototype, with the exceptions of subsections (4), (9), (10), (18), (19), and (20) that are borrowed from MCA § 35-4-104 of the Montana Professional Corporation Act. These terms appear throughout the Montana Limited Liability Company Act.

Subsection 19 defining "professional service" is adapted from MCA § 35-4-104(5), which is based on § 3(7) of the American Bar Association's Model Professional Corporation Supplement. The Official Comment to § 3(7) of the Model Professional Corporation Supplement is helpful:

> "The definition of 'professional service' in section 3(7) limits and describes the purpose for which corporations may be organized under section 11. As a

general proposition, corporations may not be formed under business corporation acts for the purpose of practicing a 'profession' or rendering 'professional services.' In the absence of a statutory definition, however, the courts have held that not all licensed services are 'professional services.'

"As a result, the determination of whether particular licensed services may be rendered by corporations has been made on a case-by-case basis under the state business corporation act and the applicable licensing law.

"The definition of 'professional service' in section 3(7) adopts the conclusions reached by courts in this litigation and defines a "professional service" as a licensed service that 'may not be lawfully rendered by a corporation under the [Model] Business Corporation Act.' All professions that meet this standard may incorporate as professional corporations under this supplement."

§ 3. Name.

Montana Comment: Though based on § 103 of the ABA Prototype, this section has been modified to:

- change the "deceptively similar" standard to "distinguishable" in subsection (2). This change conforms the LLC law to the Montana Business Corporation Act.
- prohibit LLC names not distinguishable from reserved names.
- prohibit LLC names not distinguishable from other names registered (or reserved) with the secretary of state.

This section lists the requirements regarding a company name that a limited liability company must abide by to make a name effective.

This section incorporates by reference MCA § 35-1-310, which provides an administrative procedure for resolving name contests.

§ 4. Reservation of name.

Montana Comment: This section is modeled after § 104 of the ABA Prototype Act, which is derived from the provisions of the Revised Uniform Limited Partnership Act (RULPA). This section, overall, clarifies who has the exclusive right to reserve a company, name and the procedures for reservation of the chosen name.

§ 5. Registered office and registered agent.

Montana Comment: This section is modeled after § 105 of the ABA Prototype Act, which is based on § 105 of the RULPA. This section requires a limited liability company to designate a registered agent and provides the company with attending powers to change the address. This section sets forth the procedures for designing or changing an address and lists the requisite contents of the statement indicating such change.

§ 6. Purpose.

Montana Comment: This provision is based on MCA § 35-1-114 and follows the current Montana scheme of not allowing business organizations with limited liability to engage in the business of banking or insurance. Banks and insurance companies must incorporate under the banking and insurance statutes.

Certain types of professional service business may only organize as professional limited liability companies. *See* § 2 (19).

§ 7. Powers.

Montana Comment: This section names the powers held by the limited liability company. Except for subsections (14) and (15), this section is modeled after an earlier version of the ABA Prototype Act, which relied on Wyo. Stat. § 17-5-103 (1977) as its source. Subsections (14) and (15) have been added to conform to MCA § 35-1-115.

While the ABA Prototype Act no longer includes a powers section, the drafters of the Montana Act included a powers section to clarify the powers of an LLC are as broad as those of business corporations.

§ 8. Formation.

Montana Comment: This section is modeled after § 201 of the ABA Prototype Act. This section clarifies the procedures involved in the formal formation of a limited liability company.

It is anticipated that the secretary of state will follow procedures similar to those described in MCA § 35-1-1309 when filing documents. If a document delivered to the secretary of state satisfies the statutory requirements, the secretary of state shall have the obligation to file it.

The Subcommittee debated whether to permit one-owner limited liability companies. The advantage to permitting one-person limited liability companies is obvious – a one-person business could receive the benefits of limited liability without having to comply with corporate formalities. The disadvantage to permitting one-person LLCs is that elimination of the statutory requirement of association of two or more will jeopardize the

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ability of an organization finding itself with only one member to receive partnership-type tax treatment.

It is clear that at formation, an LLC must have at least two members to secure partnership tax treatment. Treas. Reg. §§ 1.761-1(a). Individuals forming LLCs with one member should be aware of the cautions set forth in the ABA Commentary to § 201 of the Prototype Act:

> "LLCs must have at least two members at formation to initially secure partnership status for federal tax purposes, and must continue to have at least two members at all time to avoid terminating for tax purposes. The Internal Revenue Code defines the term partnership to include a "syndicate, group, pool, joint venture, or other unincorporated association" that carries on any business. I.R.C. §§ 761(a) and 7701(a)(2) (1986). The very essence of a partnership contemplates two or more partners joining together as coproprietors to engage in business and share the profits. Treas. Reg. §§ 1.761-1(a), 301.7701-3(a); Commissioner v. Culbertson, 337 U.S. 773 (1949); Luna v. Commissioner, 42 T.C. 1067 (1964); Ian T. Allison, 35 T.C.M. (CCH) 1069 (1976). Moreover, the regulations state that a partnership's business is no longer carried on by the partners if there is only one remaining partner; consequently, such partnership will terminate. Treas. Reg. § 1.708-1(b)(1)(i). *See generally* Keatinge, Ribstein, Hamill, Gravelle, and Connaughton, "The Limited Liability Company, A Study of The Emerging Entity," 47 Business Lawyer 375 (1992); Gazur and Goff, "Assessing the Limited Liability Company," 41 Case Western Reserve L. Rev. 387, 396-98 (1991)."

Ultimately, the drafters of the Montana Act agreed that it is advisable to permit one person LLCs, even though the one person LLC will not be taxed as a partnership. The drafters of the Montana Act agreed with the following Commentary to § 201 of the ABA Prototype Act:

> "Section 201 does not require an LLC to have two or more members at the time of its formation because of the concern that such a requirement may raise questions about the proper organization of an LLC that fails to have two or more members at the time of its formation. If, for example, the ministerial act of signing and filing articles of organization with the Office of the Secretary of State occurs on a Monday, and a written operating agreement among several members is finalized on the next day, a question may arise as to whether the LLC was properly formed. Although for tax purposes the LLC will not be recognized until the LLC has at least two members, failure to have two members at the time of formation should not result in the LLC not being properly formed for other purposes."

§ 9. Articles of organization.

Montana Comment: Except for subsections (1)(d) and (1)(e), this section is modeled after § 202 the ABA Prototype Act.

Section (1)(e), based on the Utah Limited Liability Company Act, provides for some additional public accountability and is consistent with the Limited Partnership Act's requirement of disclosure of partners.

Subsection (1)(f) is not part of the ABA Prototype, but is designed to provide for professional limited liability companies.

In its original draft, the Subcommittee followed the Wyoming, Texas and Nevada statutes by allowing a thirty-year maximum period. The Subcommittee originally thought that the thirty-year period was desirable in order that the perpetual life aspect of corporations not exist for tax purposes. Upon further consideration the Subcommittee deleted the thirty-year maximum life. The Subcommittee recognized that a thirty-year maximum was cumbersome and would create traps for those who did not extend the corporate life at the end of the thirty-year period. The drafters of the Montana Act were persuaded by the following analysis of Wayne Gazur and Neil Goff:

> "The limitation of the duration of an LLC to a term of thirty years could reduce its appeal to the participants of a long-term business undertaking. Although LLC members would arguably not be precluded from agreeing to reform an expiring LLC, the uncertainty attending the statutory limitation on LLC duration represents a disadvantage when compared with the competing corporate or limited partnership alternatives, which are not similarly restricted.
>
> "The origin of the LLC's limited duration might lie in the limited partnership association statutes of Michigan, New Jersey, and Ohio, which contained twenty-year limitations. The thirty-year limitation should be eliminated if it is based on the precedent of limited partnership associations or on misplaced fears of adverse federal income tax entity classification." Gazur & Goff, *Assessing the Limited Liability Company*, 41 CASE WESTERN RES. L. REV. 399-400 (1991).

Treasury Regulations § 301.7701-2(b)(3) should eliminate any fear that a statutory maximum term is required to eliminate the corporate aspect of perpetual life. It states

> "(3) An agreement establishing an organization may provide that the organization is to continue for a stated period or until the completion of a stated undertaking or such agreement may provide for the termination of the organization at will or otherwise. In determining whether any member has the power of dissolution, it will be necessary to examine the agreement and to ascertain the effect of such agreement under local law. For example, if the agreement expressly provides that the organization can be terminated by the

will of any member, it is clear that the organization lacks continuity of life. However, if the agreement provides that the organization is to continue for a stated period or until the completion of a stated transaction, the organization has continuity of life if the effect of the agreement is that no member has the power to dissolve the organization in contravention of the agreement. Nevertheless, if, notwithstanding such agreement, any member has the power under local law to dissolve the organization, the organization lacks continuity of life. Accordingly, a general partnership subject to a statute corresponding to the Uniform Partnership Act and a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act both lack continuity of life."

§ 10. Amendment of articles of organization; restatement.

Montana Comment: This section is modeled after § 203 of the ABA Prototype Act which derived its provisions from the Colo. Stat. §7-80-209. Subsection 4 is not based on the Colorado Act. Subsection (4) allows the secretary of state to provide additional rules governing the form and manner of amendments.

The rules for when and how the members may amend the articles of organization (e.g. by majority or unanimous vote) are to be determined by the operating agreement.

§ 11. Execution of documents.

Montana Comment: This section is modeled after § 204 of the ABA Prototype Act.

§ 12. Filing with the secretary of state.

Montana Comment: This section is modeled after § 205 of the ABA Prototype Act, which is based on § 206(a) of the RULPA. It has been adapted to conform with Montana practice.

§ 13. Effect of delivery or filing of articles of organization.

Montana Comment: This section is modeled after § 206 of the ABA Prototype Act.

§ 14. Filing of a facsimile copy.

Montana Comment: This provision is not from the ABA Prototype, but is adapted from MCA § 35-12-645. It clarifies the requirements of filing a proper facsimile copy and the extent of the facsimile's effect.

§ 15. Annual report for secretary of state.

Montana Comment: This provision is not from the ABA Prototype Act. The drafters of the Montana LLC Act recommend inclusion of this provision because:

- annual reports provide information to the public. Because owners of limited liability companies provide members with protection from liability for the debts of the organization, it is desirable to provide the public with some information about limited liability companies.

- the legislation should allow the secretary of state to remove inactive limited liability companies from its records. If a corporation fails to file an annual report the secretary of state is allowed to administratively dissolve the corporation.

This section is patterned after MCA § 35-1-1104(1), (3)-(5) (Annual Reports for Corporations). It sets forth the required contents of an annual report and the procedure for effective delivery and filing. The information required is generally no greater, however, than that required of limited partnerships. See MCA § 35-12-611 (Application for Certificate of Renewal). The proposed legislation also borrows from MCA § 35-4-209 (Annual Reports for Professional Corporations) by requiring professional limited liability companies to file a statement that all of the members and not less than 50 percent of their managers are persons holding the appropriate professional license.

The Subcommittee spent considerable time determining whether the names of owners should be disclosed. In the event management is separate from membership, the Subcommittee agreed on the need for public disclosure of managers' names to add certainty to commercial transactions. Those dealing with purported managers could, to some degree, verify the individual was a manager. Instead of requiring disclosure of each and every member, the Committee decided disclosure of one member's name would be sufficient.

§ 16. Administrative dissolution.

Montana Comment: This section is not from the ABA Prototype but is instead adapted from MCA § 35-6-102(1)(e). This section clarifies that the secretary of state has the power to dissolve the limited liability company if the entity has failed to comply with certain secretary of state requirements.

§ 17. Reinstatement of dissolved limited liability company.

Montana Comment: This section is not from the ABA Prototype but is instead adapted from MCA § 35-6-201. This section clarifies the procedures for reinstatement of a dissolved limited liability company.

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§ 18. Fees for filing, copying and service-rules

Montana Comment: This section is not based on the ABA Prototype, but is consistent with the Montana practice of assessing license fees to organize business entities in which shareholders benefit from limited liability. The license fee equals the license fee for Montana business corporations with up to 50,000 shares. *See,* MCA § 35-1-1207.

§ 19. Fees for filing, copying, and services.

Montana Comment: This section is not from the ABA Prototype, but is based on the Montana tradition of establishing fees by administrative rule. *See, e.g.*, MCA § 35-1-1206. It provides that the secretary of state shall establish fees for filing, copying and services.

§ 20. Agency power of members and managers.

Montana Comment: This section is modeled after § 301 of the Prototype Act. The drafters of this section clarify its purpose in the Commentary to § 301 of the ABA Prototype Act:

> "This Section provides a means by which the members can limit the persons who have authority to bind the LLC in transactions with third parties. It should be contrasted with § 401, which provides for allocation of governance functions within the LLC under the operating agreement. Pursuant to § 401, the members have the flexibility to provide for any form of governance they wish in the operating agreement. Under § 301, the parties' choice of governance form impacts third parties only to the extent that the articles of organization state whether the LLC is managed by managers or by members. By the same token, the enforcement of the management rights and restrictions as between the parties to the operating agreement does not turn on the disclosure in the articles of organization.
>
> "Unless the articles of organization provide for management by managers, this section would cause the act of any member to bind the company to the same extent as the act of a general partner in a general partnership. The agency extends to transactions which are carried on in the usual way of the business *or affairs* of the limited liability company in order to address those situations where it is unclear whether the activities of the limited liability company rise to the level of a business. As under the UPA, acts which are outside the usual course of business may be actually authorized, and acts which otherwise would be apparently authorized are not binding to the extent that creditors know of a restriction on the member's authority. Because this Section is based closely on the UPA, courts are likely to apply partnership precedents."

§ 21. Admissions of members and managers.

Montana Comment: This section is modeled after § 302 of the ABA Prototype. According to the Commentary to § 302 of the ABA Prototype:

> "This provision clarifies that a member or manager's admission or statement is evidence against the firm if it concerns matters within the authority of the member or manager to bind the firm unless it is a statement by a member in a manager-managed firm."

§ 22. Limited liability company charged with knowledge of or notice to member or manager.

Montana Comment: This section is modeled after § 303 of the ABA Prototype, which is based on UPA § 12.

§ 23. Liability of members to third parties.

Montana Comment: This section is modeled after § 306 of the ABA Prototype. The drafters of the Montana Act agree with the Commentary to § 306 of the ABA Prototype that liability is not eliminated when damage occurs from the member's or manager's own acts or omissions:

> This section is not intended to relieve a member from liability arising out of his own acts or omissions to the extent such acts or omissions would be actionable, either in contract or in tort, against the member if he were acting in his individual capacity. For instance, a member may become liable in contract to a third party creditor of the limited liability company through a guarantee or similar arrangement. A member also may become liable in tort for claims against the limited liability company as a result of his negligence in appointing, supervising, or participating in the activity in question with a manager, employee, agent or other member of the limited liability company. Accordingly, with respect to his liability for the debts and obligations oft he limited liability company, a member is analogous to a limited partner or a stockholder. This section does not address a manager's liability for the debts and obligations of the limited labilities company because, like a corporate officer, a manager serves only as an agent of the limited liability company such that, as a general rule, there should be no grounds for imposing liability on the manager.

§ 24. Management.

Montana Comment: This section is modeled after § 401 of the ABA Prototype which relied on identical provisions from statutes in several states. *See, e.g.*, Fla.

Stat. § 608.422, Kan. Stat. § 17-7612; Nev. Stat. § 312; Utah Stat. § 48-2(b)-125, and Wyo. Stat. § 17-15-116.

The drafters of the Montana Act intend to allow for maximum flexibility in the governance of LLCs. The drafters created a "default rule" that LLCs are managed by members in the absence of an operating agreement providing for management by managers. The Montana drafters agree with the following Commentary to § 401 of the ABA Prototype Act.

> "The emerging LLC model adopted by most LLC statutes calls for management directly by the members. This is based on several important factors. First, because LLC interests are not freely transferable, members who are dissatisfied with their investments must resort to active involvement rather than simply exiting the firm like public corporation holders. In this critical respect, LLCs necessarily resemble close corporations. Second, vesting management in one or more managers would generally result in centralized management for tax purposes under § 7701 of the Internal Revenue Code. Accordingly, a company would need free transferability and continuity of life to qualify for partnership tax treatment. Third, although many LLCs may prefer centralized management, default provisions should anticipate the preferences of the relatively small LLCs that are most likely not to incur the costs of entering into a customized agreement. Such firms are likely to prefer management directly by managers."

§ 25. Duties of managers and members.

Montana Comment: This section is modeled after § 406 of the ABA Prototype Act.

This section deals with both the duty of care and the duty of loyalty. The Montana drafters agree with the Commentary to § 406 of the ABA Prototype Act as it describes the duty of care:

> "Section (A) sets forth the gross negligence standard of care for those participating in management. This is similar to that for corporate directors, managing partners, or general partners of limited partnerships. In general, as long as managers avoid self-interested and grossly negligent conduct, their actions are protected by the business judgment rule. With respect to general partnerships, see RULPA § 404(d).
>
> "Although the duty of care has been formulated in similar terms for managers of all types of firms, as noted above there are important differences among firms that may result in variations in applying the general standard. The duty of care may be lower in a general partnership

because the partners' individual liability makes it likely not only that managing partners will manage carefully, but that non-managing partners will at least take an active interest in management. At the other end of the spectrum, limited partners or shareholders in a publicly traded corporation may be removed from management and may rely more heavily on fiduciary duties. LLCs, which have limited liability members, but which can be expected to be closely held because management rights are not freely transferable, may lie between these two extremes. Moreover, there will be differences among LLCs. It is likely that the precise boundaries of the duty will be left to develop by case law and operating agreement rather than by statutory provision."

Likewise, the drafters of the Montana Act agree with the Commentary to § 406 of the ABA Prototype describing the duty of loyalty:

"The duty of loyalty under this Section is defined to include two major components: 'Self-dealing,' or a manger's reaping an individual profit by or through an LLC transaction in which the manager participated, and liability for appropriating for personal use property belonging to the LLC without the firm's consent. Such appropriation would amount to, in effect, unauthorized compensation. This duty follows from the simple fact that LLC property is owned by the firm as a whole rather than by individual managers or members. Note that property is defined to include records of the LLC that are in the manager's control. Because of the similarity of this section with the UPA, the courts undoubtedly will interpret it as imposing duties similar to those in the general partnership, including the duty not to appropriate partnership opportunities."

For an in-depth discussion of the duties of care and loyalty for Montana business corporations, *see* Bahls, *Montana's New Business Corporation Act: Duties, Dissension, Derivative Actions and Dissolution*, 53 MONT. L. REV. 3-52 (1991).

§ 26. Voting.

Montana Comment: This section is modeled after § 403 of the ABA Prototype. This section establishes as a default rule, per capita voting. The members may modify this scheme if they so desire. Some LLCs will wish to allocate voting rights according to their capital continuations, as in corporations. If limited liability companies chose to allocate voting on the basis of capital contributions, the operating agreement should make it clear whether a member's unperformed promise to contribute cash, property or services should be considered.

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§ 27. Limitation of liability and indemnification of members managers.

Montana Comment: Except for subsection (2) and the ability to limit the liability of members, this section is modeled after § 404 of the ABA Prototype.

Subsection (2) is adapted from MCA § 35-1-216 in order to follow the existing Montana public policy regarding elimination of liability when an intentional infliction of harm is involved.

Just as a manager's default liability should be comparable to that of a corporate director, the liability should also be subject to variation by agreement. This section allows the limited liability company flexibility when dealing with manager liability and requires less formality than the corporate statute, which is designed for firms with very dispersed holders (members).

§ 28. Records and information.

Montana Comment: This section is modeled after § 405 of the Model Act. The drafters of the Montana Act agree with the Commentary to § 405 of ABA Model Act:

> "Subsection (1) is permissive in the sense that it only specifies where the relevant documents must be kept *if* they are prepared. Although the benefits of producing certain fundamental information regarding the limited liability company outweighs the costs of potential abuses and added litigation, it is not clear which records should be required, or what should be the consequences of failing to prepare the records. LLCs generally will keep the records listed in this Section for business and tax reasons. Moreover, most written agreements relating to such matters as contributions and events of dissolution would fall within the broad definition of an operating agreement and therefore would be required to be maintained by this Section."

§ 29. Contributions to capital.

Montana Comment: This section is modeled after § 501 of the ABA Prototype, which relied on RULPA § 501 as its source. It clarifies the acceptable form of a contribution to the limited liability company.

§ 30. Liability for contribution.

Montana Comment: This section is modeled after § 502 of the ABA Prototype which relies on RULPA § 502(c) as its source for subsection (3)(b). The ABA had much discussion about this section and urges that 3(b) must be included in this statute to

provide the creditor who has relied detrimentally upon an obligation a right to proceed on the obligation.

§ 31. Sharing of profits and losses.

Montana Comment: This section is modeled after § 503 of the ABA Prototype Act. Profits and losses on the basis of capital interests. The proposed Montana LLC Act distributes profits and losses on a per capita basis. The Subcommittee believed that an equal distribution presumption is the appropriate default rule. While a "capital interest" method of distribution may be more appropriate in capital intensive limited liability companies, the equal distribution rule may be more appropriate in service limited liability companies. As capital intensive limited liability companies are more likely to be represented by attorneys than service limited liability companies, it was decided that default rules should protect the unrepresented. Further, for those businesses desiring a capital interest method of allocating profit and losses, it is probably impossible to generalize how and when those businesses wish to compute capital interests.

This section is intended to establish the scheme upon which profits and losses will be allocated among the members and distributions made to them in the absence of a specific agreement.

§ 32. Sharing of distributions.

Montana Comment: This section is modeled after § 601 of the ABA Prototype. This section provides for a per capita default method of sharing of profits and losses. The last sentence is intended to set forth the time for distributions other than on withdrawal or distribution.

§ 33. Distributions on an event of dissociation.

Montana Comment: This section is patterned after § 602 of the ABA Prototype Act.

§ 34. Distribution in kind.

Montana Comment: This section is modeled after § 604 of the ABA Prototype which relied on RULPA § 605 as its source. This provision provides that no member may demand property in kind unless the operating agreement calls for it. As well, it intends to place an appropriate restriction on the limited liability company's ability to "dump" a disproportionate amount of undesirable property on a member.

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§ 35. Distributions.

Montana Comment: This section is from § 605 of the ABA Prototype, but has been modified for clarity. This section draws heavily from a corresponding provision concerning restrictions on distribution contained in the Model Business Corporation Act. This section is designed to assure that a distribution will not render a corporation insolvent under either of two tests.

§ 36. Liability upon wrongful distribution.

Montana Comment: This section is modeled after § 606 of the ABA Prototype, but has been modified for clarity. The third subsection of § 606 of the ABA Prototype providing for a separate statute of limitations has been deleted. This section is intended to hold certain members or managers personally liable to the limited liability company for wrongful distributions. It allows members or managers who are liable for an unlawful distribution to demand contributions from other members and managers who meet certain conditions.

§ 37. Right to distribution.

Montana Comment: This section is modeled after § 607 of the ABA Prototype Act. The Commentary to § 607 of the ABA Prototype Act describes the purpose of this section:

> "The benefit of this provision is that it allows a limited liability company to convert equity to debt rather than actually paying out cash without fear that later payment of that debt will subject members or managers to liability. This is an important aspect of redemption agreements. Clearly if the limited liability company could have paid cash, it should be able to retain the cash and pay later, if that is in the best interest of the limited liability company."

§ 38. Ownership of limited liability company property.

Montana Comments: This section is modeled after § 701 of the ABA Prototype Act, which is based on the partnership law. The first sentence of subsection one is from the Uniform Partnership Act (1992). The second sentence is from the Delaware Limited Partnership Act. The Committee agrees with the following Commentary to § 701 of the ABA Prototype Act:

> "This section clarifies that, unlike a partnership under the UPA, LLC property is owned by the firm itself rather than nominally or otherwise by the members. This ensures that the "tenancy in partnership" which has confused partnership law will not plague LLC's. It is implicit in this Section that a member may

be able to use LLC property for LLC purposes provided he is authorized to do so."

§ 39. Transfer of real property.

Montana Comment: This section is modeled after § 702 of the ABA Prototype Act, which is based on partnership law.

§ 40. Nature of membership interest.

Montana Comment: This section is modeled after § 703 of the ABA Prototype Act, which is derived from § 701 of the RULPA.

§ 41. Assignment of membership interest.

Montana Comment: This section is modeled after § 704 of the ABA Prototype Act, which is based on § 14-9-702 of the Georgia Uniform Limited Partnership Act. Interests in limited liability companies are not freely transferable. Lack of free transferability of interests helps insure favorable partnership tax treatment.

It is intended that the personal representative, successor or other legal representative of a deceased, incompetent or dissolved member is treated as assignee of a member's interest.

The Committee agrees with the following Commentary to § 704 of the ABA Prototype Act:

> "With respect to subsection (1)(a), unlike a corporate shareholder, but like a partner, an LLC member can freely transfer only financial rights, at least in the absence of contrary agreement. The requirement of a writing is suggested since members would expect to have such a right to assign and should not be denied the right by a mere oral agreement. Note that authority in the partnership context for invalidating restrictions on transferability might be applied to LLC's. Because assignment of a membership interest transfers only financial rights, it follows that a transfer does not constitute a change in membership, and therefore does not dissolve the LLC."

§ 42. Rights of judgment creditor.

Montana Comment: This section is modeled after § 705 of the ABA Prototype and was derived from RULPA § 703, with appropriate changes of terminology for limited liability companies. This section clarifies the rights of a judgment creditor and the responsibilities of a member owing to that creditor.

The Committee agrees with the following Commentary to § 705 of the ABA Prototype Act:

> "This Section provides that unsecured creditors can obtain from a court a charging order, which is a sort of attachment or garnishment, against the member's interest. Under this Section, the charging order is available only to judgment credits of members. It is therefore not available to divorced spouses under alimony decrees and others with rights against members other than those of judgment creditors. It also cannot be used by judgment creditors of members' assignees.
>
> "A charging creditor has the rights of an assignee to the extent that the interest is charged. This implies that the creditor need not foreclose on the interest to acquire the full rights of an assignee."

§ 43. Right of assignee to become a member.

Montana Comment: This section is based on § 706 of the ABA Prototype with some clarifying changes. The ABA Prototype derived these provisions from RULPA § 704(b) & (c) and made appropriate changes. This section clarifies who must approve an assignee for membership and the extent of the rights and obligations of an assignee who becomes a member.

The Subcommittee agrees with the Commentary to § 706 of the ABA Prototype Act that states:

> "A statute that permits variation of the unanimous consent rule by agreement of the members will enable the members to create the corporate characteristic of free transferability of interests for federal income tax classification purposes, perhaps inadvertently. At present, it is not certain whether a majority consent requirement would be sufficient, in the view of the Internal Revenue Service, to avoid the characteristic of free transferability of interests."

§ 44. Admission of members.

Montana Comment: This provision of the Act is modeled after § 801 of the ABA Prototype, which is based on § 301 of the RULPA.

§ 45. Events of dissociation.

Montana Comment: This section is derived from § 802 of the ABA Prototype Act. The Commentary to § 802 of the ABA Prototype Act explains:

"This Section makes clear what constitutes a member dissociation that entitles the member to payment under § 803 whether or not the firm continues after dissociation. Note that this Section refers to member "dissociation," which is a broad term that includes the voluntary act of "withdrawal." The events specified in this Section constitute sufficient dissociation to dissolve a general partnership and to cause the cessation of a general partner's status as such in, and dissolution of, a limited partnership. By contrast, in the absence of contrary agreement, such events apparently do not cause the withdrawal of a limited partner or the dissolution of a limited partnership. LLC members should be treated more like general partners than like limited partners since, under most LLC statutes and the Prototype, LLC members are assumed to be active in management unless the agreement provides otherwise. Accordingly, an event such as death, or dissolution of a member who is a business association, that terminates the member's ability to participate in the firm sufficiently changes the nature of the member's deal that she would expect to terminate her relationship with the firm.

The Montana Act, § (1)(k) differs from the ABA Prototype Act by providing that loss of professional license in a professional limited liability company will be considered dissociation.

§ 46. Dissolution.

Montana Comment: This section is based on § 901 of the ABA Prototype Act. The Montana LLC Act permits the members to continue, by unanimous agreement, the business of the limited liability company, thereby avoiding a dissolution. The purpose is to help assure that, in the normal case, the limited liability company will lack the corporate tax feature of continuity of life. The Subcommittee opts for requirement of a unanimous vote for continuation because of a private letter ruling that a Florida LLC possessed the corporate characteristic of continuity of life when members could continue the business with a mere majority vote. Priv. Ltr. Ruling 90-10-627 (Dec. 7, 1989).

Section 51 of the Act states that "upon the dissolution and the commencement of winding up of the limited liabilities company, articles of dissolution shall be filed in the office of the secretary of state." While it is hoped that dissolving LLCs will file articles of dissolution, dissolution occurs upon the happening of the events described in section 46, whether or not articles of dissolution are in fact filed."

§ 47. Judicial dissolution.

Montana Comment: This section is modeled after § 702 of the ABA Prototype which followed the corresponding provision from RULPA. Examples of when it might not be reasonably practicable to carry on a business are found at MCA § 35-10-605(1). The reasons include:

(1) a member is declared seriously mentally ill in a judicial proceeding or is shown to be mentally incompetent;

(2) a member becomes in any other way incapable of performing his or her part of the operating agreement;

(3) a member has been guilty of such conduct as tends to affect prejudicially the carrying on of the business;

(4) a member willfully or persistently commits a breach of the operating agreement or otherwise so conducts himself or herself in matters relating to the business that it is not reasonably practicable to carry on the business in partnership with him or her;

(5) the business of the limited liability company can only be carried on at a loss; or

(6) other circumstances render a dissolution equitable.

This section provides the district court with the power to dissolve the limited liability company, upon the happening of certain events. Parties may include circumstances such as those listed in the comments in the articles of organization or operating agreement. Upon the occurrence of a named event, and the application by or for a member, a judge may issue a dissolution decree.

Courts should recognize that a decree of dissolution may be an inappropriate, draconian remedy. It may allow one shareholder to hold a sword over the head of the majority. In the corporate case of *Maddox v. Norman*, 669 P.2d 230 (1983), the Montana Supreme Court recognized this problem and fashioned a less drastic remedy. This section is not intended to limit the court's equitable power to further other remedies. For a description of a court's equitable power and considerations courts should analyze when selecting the appropriate remedy, *see* Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285 (1990).

§ 48. **Winding up.**

Montana Comment: This section is modeled after § 903 of the ABA Prototype, which followed the corresponding provision from RULPA. This section identifies who may wind up the limited liability company.

§ 49. **Agency power of managers or members after dissolution.**

Montana Comment: This section is modeled after § 904 of the ABA Prototype.

§ 50. Distribution of assets.

Montana Comment: This section is modeled after § 905 of the ABA Prototype, which is based on the RULPA. It is important to note that members' debts may be subject to equitable subordination in bankruptcy.

§ 51. Articles of dissolution.

Montana Comment: This section is based on § 906 of the ABA Prototype and clarifies the required contents of the articles of dissolution. The ABA Prototype relied on RULPA as its source, but made appropriate changes in terminology. For example, RULPA uses the term "cancellation of certificates" to denote this section. The Prototype appropriately changed this term to "articles of dissolution" as the dissolution of a limited liability company is based upon the filing of articles of dissolution. Subsections (6) and (7) are not from the ABA Prototype. They are included here to increase certainty in commercial transactions.

This section is desirable in order that creditors of the LLC be informed of the dissolution and have ample opportunity to present claims. It is also necessary to enable the secretary of state to maintain accurate lists of active LLCs.

Dissolution is not contingent on filing articles of dissolution. Rather dissolution occurs upon the happening of an event stated in § 46. Limited liability companies have an incentive, however, to file articles of dissolution. Not only does § 51 purport to require a filing, but § 51 allows limited liability companies filing articles of dissolution to limit liability for known claims.

§ 52. Revocation of dissolution.

Montana Comment: This section is not based on the ABA Prototype, but is consistent with the Montana practice of permitting a corporation to take action to revoke its dissolution. This provision of the law is patterned after MCA § 35-1-934.

§ 53. Known claims against dissolved limited liability companies.

Montana Comment: This section is modeled after § 907 of the ABA Prototype, which is similar to MCA § 35-1-936 (Known claims against dissolved corporations). This section clarifies the procedures for making claims against a dissolved LLC and provides a procedure for extinguishing known claims.

§ 54. Unknown claims against dissolved limited liability companies.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-937 (Unknown Claims Against Dissolved Corporations). See Bahls,

Montana's New Business Corporation Act: Duties, Dissension, Derivative Actions and Dissolution, 53 MONT. L. REV. 3, 41-51 (1992). This section clarifies the rights and responsibilities of members and managers upon dissolution.

Subsection one is intended to protect the rights of creditors who possess unknown claims. It is consistent with a sound policy of insuring that creditors are satisfied before capital is returned to members. There is no separate limitation period for making claims for unknown debts of an LLC. The statute of limitations applying to unknown creditors of a dissolved LLC is usually tort, contract or other applicable limitation period.

Subsection two codifies the common law trust fund doctrine that provides that the property of a dissolved business is considered a trust fund for the payment of corporate debts. As such, members take assets upon dissolution subject to the claims of creditors. Codifying this doctrine adds certainty to the law.

Subsection three codifies the holding in *North American Asbestos Corp. v. Superior Court*, 180 Cal. App.3d 902, 225 Cal. 877 (1986). This case holds that when the corporate code of the state of incorporation regarding limitation periods for claims against dissolved corporations differs from the corporate code in the jurisdiction where a claim arises, the law of the jurisdiction where the claim arises applies. Subsection three applies this rule to limited liability companies.

§ 55. Authority to transact business required.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1026. It clarifies that a foreign limited liability company must have a certificate of authority from the secretary of state before it may transact business in the state. Further, this section sets forth an unexhaustive list of activities that a foreign limited liability company may engage in without the certificate of authority from the secretary of state.

§ 56. Consequences of transacting business without authority.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1027. It clarifies the consequences and limits of a foreign limited liability company transacting business without a certificate of authority to do so from the secretary of state.

§ 57. Application for certificate of authority.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1028. It clarifies the application requirements for a certificate of authority.

§ 58. Registered office and registered agent of foreign limited liability company.

Montana Comment: This section is not based on the ABA Prototype, but is consistent with the Montana practice of regulating registered offices and registered agents of foreign business entities. This provision of the law is patterned after MCA 35-1-1032.

§ 59. Resignation of registered agent of foreign limited liability company.

Montana Comment: This section is not based on the ABA Prototype, but is consistent with the Montana practice of regulating resignation of registered agents of foreign business entities. This provision of the law is patterned after MCA § 35-1-1036.

§ 60. Change of registered office or registered agent of foreign limited liability company.

Montana Comment: This section is not based on the ABA Prototype, but is consistent with the Montana practice of regulating changes of registered offices and agents of foreign business entities. This provision of the law is patterned after MCA § 35-1-1033.

§ 61. Amended certificate of authority.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1029. It clarifies the requirements for obtaining an amended certificate of authority.

§ 62. Effect of certificate of authority.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1030. It sets forth the powers and limits of a certificate of authority.

§ 63. Name.

Montana Comment: This section is based on § 1004 of the ABA Prototype, which relied on the Virg. Stat. as its source. It requires the foreign limited liability company to satisfy the name requirements that a domestic limited liability company must meet under § 3. In addition, it provides alternatives for filing for a name if § 3 cannot be met.

§ 64. Withdrawal of foreign limited liability company.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1037. It sets forth the application requirements a foreign limited liability company must satisfy to officially withdraw from the state.

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§ 65. Grounds for revocation.

Montana Comment: This section is not based on the ABA Prototype Act but is based on MCA § 35-1-1038. It clarifies the grounds on which the secretary of state may commence a proceeding under § 61 to revoke the certificate of authority of a foreign limited liability company authorized to transact business in the state.

§ 66. Procedure for and effect of revocation.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1039. It sets forth the procedure that the secretary of state will engage in to revoke a certificate of authority and the effect of such revocation.

§ 67. Appeal from revocation.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-1-1040. It provides the procedure for an appeal from revocation of a certificate of authority.

§ 68. Admission of foreign professional limited liability companies — application — revocation.

Montana Comment: This section is not based on the ABA Prototype, but is based on MCA § 35-4-411. It sets forth the application requirements for a certificate of authority that a foreign professional limited liability company must satisfy to transact business in the state, as well as the procedure invoked by the secretary of state for revocation of a certificate of authority.

§ 69. Suits by and against the limited liability company.

Montana Comment: This section is modeled after § 1101 of the ABA Prototype Act.

§ 70. Authority to sue on behalf of limited liability company.

Montana Comment: This section is modeled after § 1102 of the ABA Prototype. This section, under limited circumstances, permits members to bring a derivative-type action.

The Commentary to § 1102 of the ABA Prototype Act is particularly helpful:

> "Under this Section, suits by the LLC are authorized as among the members according to rules similar to those applying to other acts or transactions by the LLC. However, this Section makes clear that the suit may be authorized by

member vote even if the LLC is otherwise managed by managers, and that the member vote must be *disinterested.* Interested members are excluded both as votes and in determining the number of votes necessary for a majority. However, the lead-in to this Section makes clear that the parties may provide for any other voting rule in the operating agreement. Some firms may wish to authorize suit more readily by providing that a member or manager can proceed with a suit in the absence of an explicit vote unless there is an objection by enough members to block the suit within a certain time after receiving notice of the suit. Objections of members not made within a specified time would be waived. For any authorized suit, whether or not it is successful, expenses would, of course, be paid by the LLC, just as for any other acts or transactions by the LLC.

"It is important to emphasize that this Section does not permit derivative suits unless they are provided for in the operation agreement. Derivative suits are intended to deal with the problem that interested members or managers may use their management authority to block claims against them. This Section deals with this problem by providing that (1) a majority of members may always authorize suit, even in manager-managed LLC's; and (2) that the votes or interested members or managers are not counted in determining the requisite number of votes for suit. The suing member may be able to establish a conflict on the basis that the objecting members or managers are defendants in the suit, although this may not be sufficient. Moreover, even members or managers who are not defendants may be sufficiently related financially or otherwise to the defendants that their judgment in voting on the suit could be characterized as impaired . . .

"It is important to keep in mind that this Section is intended as only a default provision. Thus, the members can provide in the operating agreement for other remedies, including a derivative remedy. Some firms may wish to adopt the derivative suit provisions in RULPA (although that does not represent an endorsement by the Committee of those provisions). Drafting such provisions should be cost-justified for the larger firms in which derivative suits may be appropriate. On the other hand, for smaller, more informal, firms for which derivative suits plainly are inappropriate, drafting around the statute may not be cost-justified. These firms may be stuck with the statutory default. . . .

"Note that this Section deals only with suits on behalf of the LLC. LLC members also can sue directly for harms to them individually, including claims for indemnification or for fraud in the sale of an interest in the firm under state blue sky or fraud law or the federal securities laws. These claims may be brought as individual or class actions in accordance with the procedural rules of the relevant court, including Rule 23 of the Federal Rules of Civil Procedure and state rules modeled on it.

"A court may require a plaintiff who essentially seeks recovery for damage to the firm to sue on behalf of the firm rather than directly. For example, a member may be unable to sue individually on a claim that insiders' actions reduced the value of her interest in the firm. There are several reasons for such a rule. First, it conserves litigation costs by avoiding separate suits on the members' identical causes of action. Second, entity-based recovery avoids complex problems of determining precisely how each member was damaged by the fraud. Third, and perhaps most importantly, the direct action usurps the appropriate role of the firm's managers and members in terminating the suit.

"Courts may permit claims that essentially seek redress on behalf of the firm to be brought directly. For several reasons this course of action may be appropriate for closely held firms like the typical LLC. First, in a closely held firm, it is feasible to determine the damages of each member, and therefore to structure a direct recovery. Second, recovery on behalf of the firm may prejudice members of a closely held firm because they cannot "cash in" on the award by selling their shares, so that the firm's recovery may be locked in the control of wrongdoing insiders. Some courts have been lenient in characterizing direct actions in close corporations. *See* Crosby v. Beam, 548 N.E.2d 217 (Ohio 1989). *But see* Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379 (7th Cir. 1990) (refusing to characterize close corporation suits generally as direct)."

§ 71. Merger.

Montana Comment: This section is not based on the ABA Prototype, which was rejected as unnecessarily complex. Instead, this section is based on the Utah LLC Act § 48-26-149.

This section does not allow for dissenters rights. The Subcommittee agrees with Robert Keatinge when he states:

"The principal distinction should concern dissenters' rights. Dissenters' rights arguably are important in publicly traded corporations because voting rights alone may not be enough to protect small, passive shareholders. This is less likely to be a problem for more active LLC members, particularly in member-managed firms. Moreover, in a closely held LLC, members may protect themselves from a self-dealing majority by requiring unanimous consent to mergers and other significant transactions, or by exercising their right of withdrawal."

Keatinge, et al., The Limited Liability Company: A Study of the Emerging Entity, 47 BUS. LAW. 375, 394 (1992).

§ 72. Purposes of professional limited liability companies.

Montana Comment: The ABA Prototype Act does not include provisions for a professional limited liability company. Several states' acts such as Colorado, Florida, Kansas, Nevada, Texas, Utah and Wyoming, do provide for such entities.

Attorneys and accountants, in particular, have expressed interest in doing business as LLCs.

> "Because professionals often have complex financial arrangements not susceptible to the simplicity of an S corporation, they may be constrained to use a C Corporation to limit personal liability. Use of the C corporation, however, will subject the entity to a double level of taxation and a higher tax rate. While the double taxation problem may be minimized by paying large salaries and bonuses, the C corporation mays till be an unacceptable tax vehicle for a professional practice. An LLC allows professionals to limit personal liability for the negligence and malfeasance of others in the firm, while avoiding the tax problems of C corporations."

Keatinge, et al., The Limited Liability Company A Study of the Emerging Entity, 47 Bus. Law. 375, 457 (1992).

This section is based on MCA § 35-4-205 governing professional corporations. This section allows for the creation of professional limited liability companies and generally requires such entities, with some exception, to limit their purpose to rendering services within a single profession.

The Subcommittee recognizes that the enactment of this statute alone will not enable many professionals to operate as LLCs without approval of the profession's regulators.

§ 73. Professional limited liability company name.

Montana Comment: This provision is based on MCA § 35-4-206 governing professional corporations. This section lists the requirements for an effective name.

§ 74. Professional limited liability company managers.

Montana Comment: This provision is based on MCA § 35-4-207 regarding professional corporations. It imposes a minimum requirement on the management of professional limited liability companies.

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§ 75. Membership in a professional limited liability company.

Montana Comment: This provision is based on MCA § 35-4-208 regarding professional corporations. It indicates who may be a member of a professional limited liability company.

§ 76. Rendering services.

Montana Comment: This section is based on MCA § 35-4-403 regarding professional corporations. It provides who may render services for the professional limited liability company.

§ 77. Responsibility for services.

Montana Comment: This section is based on MCA § 35-4-404. It clarifies who is and is not liable for any negligent or wrongful act or omission by an employee and the extent of that liability.

§ 78. Relationship to clients and patients.

Montana Comment: This section is based on MCA § 35-4-405. It defines the extent of the relationship involved between an individual rendering professional service as an employee of the professional limited liability company and a client or patient.

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